Supreme Court, U.S.
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10-58

No. _____

In the
Supreme Court of the United States

MARK EDW. ANDREWS,
Petitioner,

v.

D. DOUGLAS HOWARD, JR.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After being sued for malicious prosecution in state court for prior litigation in federal court, defendant attorney removed to the same federal court, on both federal-question and officer-of-the-court grounds. The district court remanded and ordered fee shifting. Defendant appealed the fee shifting and quantum of award, which were affirmed by the circuit court, with the addition of Rule-38 sanctions for frivolous appeal.

1. Is officer-of-the-court removal under 28 USC §1442 categorically unavailable to admitted attorneys?

2. Is fee shifting on remand under 28 USC §1447(c) properly imposed in the absence of clearly-established law demonstrating a lack of reasonable basis for removal?

3. Is an appeal on an unresolved or novel question frivolous and sanctionable under F.R.A.P. Rule 38?

4. May lodestar analysis of fee shifting be bypassed if a court regards litigation to be vexatious?

RULE 14.1(B) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellee and Respondent:

Desmond Douglas Howard, Jr., Attorney at Law, is a natural person of majority, admitted to practice in Louisiana, Bar. No. 7021, maintaining a professional office in New Orleans, Louisiana.

Defendant-Appellant and Petitioners:

Mark Edw. Andrews, Attorney at Law and Registered U.S. Patent Attorney, is a natural person of majority, admitted as an attorney in Louisiana (No. 26172) and California (No. 232519), maintaining a professional office in New Orleans, Louisiana.

Other Defendants-Appellants below:

Andrews Arts & Sciences Law, LLC, organized in Louisiana, is the solo-practice law firm of Mark Edw. Andrews.

Lesley Simmons St. Germain is a natural person of majority and resident of New Orleans, Louisiana.

Hillary Rose Smith is a natural person of majority and resident of New Orleans, Louisiana.

Melissa Branighan is a natural person of majority and resident of Jefferson Parish, Louisiana.

David E. Simmons, DDS, is a natural person of majority and resident of New Orleans, Louisiana, and is the father of Lesley Simmons St. Germain.

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PETITION FOR WRIT OF CERTIORARI

I, Mark Edw. Andrews, Defendant–Appellant in the action below, respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the Court of Appeals for the Fifth Circuit, *Howard v. St. Germain, et al*, 09-30642 (CA5 3/5/2010), is reproduced at Appendix A, pp.1a-4a. The Fifth Circuit's order denying rehearing was entered 13 April 2010, and is reproduced at Appendix B, p.5a. The Minute Order of the U.S. District Court for the Eastern District of Louisiana in case number 09-3450, entered 24 June 2009, and Order entered 20 July 2009, are reproduced at Appendices C, p.6a, and D, pp.7a–9a. The Supervisory Writ granted by the Louisiana Court of Appeal after the action was remanded to state court is informative— although not directly at issue— and is reproduced at Appendix E, pp.10a-38a.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on 5 March 2010. Rehearing was timely sought, and was denied on 13 April 2010. This petition is timely under 28 USC §2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the denial of rehearing on the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Fifth Circuit under 28 USC §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutes are 28 USC §1367(d) (pendant jurisdiction), and §1441, §1442, & §1447 (removal and remand), reproduced at Appendix F, pp.39a–40a.

STATEMENT OF THE CASE

This action was removed under 28 USC §1441 and §1442, with jurisdiction continuing under 28 USC §1447.

I am an attorney. My clients and I were sued in state court for malicious prosecution— in retaliation for filing a civil-RICO action in federal court. I removed to the federal court where the RICO action had been filed. The federal district court remanded and ordered me to pay attorney fees under 28 USC §1447(c). I appealed the fee-shifting and the quantum of attorney fees awarded, but did not appeal the fact of remand. The circuit court affirmed and ordered additional Rule-38 sanctions against me for bringing a frivolous appeal.

This petition is not about the remand— it is about the imposition of fee-shifting and sanctions even though there was no controlling caselaw foreclosing removal at the time of removal. It is also about the circuit court making a broad decision— affecting all attorneys admitted before the federal courts— on an issue that was not properly before the circuit court for decision.

My notice of removal stated multiple grounds, one of which was removal as an officer of the court under 28 USC §1442. I researched before removing, and saw that the only statement in the Fifth Circuit about admitted attorneys removing as officers of the court was footnote 2 of a case about a private process server, where the Fifth Circuit stated: "We do not attempt to fashion a definition of "officer of the court," nor do we opine as to whether attorneys are 'officers of the courts of the United States' within the meaning of Sec. 1442."[1]. I found no out-of-circuit caselaw that directly addressed the question of attorneys removing under §1442.

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1. *Herron v. Continental Airlines, Inc.*, 95-10645, note 2 (CA5 1/23/1996) 73 F.3d 57, 59.

As their new attorney, I represent three former clients of a divorce attorney named Howard. Those former clients filed a civil-RICO action in federal court against Howard, with pendant state-law claims of legal malpractice and breach of contract. The RICO claims were dismissed from federal court, and the pendant state-law claims were dismissed without prejudice to be re-filed in state court under 28 USC §1367(d).

The three former clients unsuccessfully appealed the federal dismissal, and did not immediately re-file in state court, but their time to do so had not expired. Meanwhile, in state court, Howard filed a defamation action against me and my clients who were formerly his clients. I filed in state court my clients' legal-malpractice claims as a reconventional demand, or counterclaim, to Howard's state-court action. These legal-malpractice claims were the ones formerly pending in federal court as pendant claims to the civil-RICO action. Howard later added claims for malicious prosecution, and the malicious prosecution was specified as being the filing and appeal of the civil-RICO action against Howard in federal court, and the filing of counterclaims in state court that were said to be time-barred. By amending his lawsuit to add claims for the filing of the counterclaims, Howard created a circular mess where normally-defensive issues of time-bar were made part of the main claims.

Louisiana imposes peremption, or a statute of repose, on claims against attorneys. Federal law at 28 USC §1367(d) either does or does not toll Louisiana's time-bar. Such a question is normally a defensive issue, but in this circular case it was an issue in the supplemented main claims. One of my grounds for removal, under 28 USC §1441, was this question of federal law 28 USC §1367(d).

Another of my grounds for removal— the one that cost me $12,955 in sanctions— was officer-of-the-court removal under 28 USC §1442. Howard explicitly sued me for acting as the attorney in federal court in the federal civil-RICO action and appeal. My research showed that removal as an officer of the court was— theoretically— available, and that there was no caselaw in the entire nation to inform me one way or the other, although there was one footnote in one case in the Fifth Circuit confirming that there was no settled caselaw.

After removal the case was transferred to the same section of federal district court that heard the earlier RICO action. The district court remanded the action to state court and assessed costs and fee-shifting under 28 USC §1447(c) against me— attorney Mark Andrews specifically by name— in the minute entry. I opposed the fee-shifting and the quantum of the award, but the other co-defendants did not oppose because they were not subject to the fee-shifting assessment. The district court's written order, however, assessed the fee-shifting against all of the co-defendants jointly and severally.

An appeal was taken on the issues of fee-shifting, quantum of award, and due-process— not the remand itself. Howard filed a motion for Rule-38 sanctions against me only— specifically disclaiming any sanctions against the other co-defendants. The Fifth Circuit affirmed the district court's fee-shifting, and added Rule-38 sanctions against *all* of the co-defendants. The Fifth Circuit held— very broadly— that removal under §1442 was categorically not available to attorneys, and that my removal was therefore improper. The opinion was silent about §1441 federal-question removal and the quantum of award. In deciding that admitted attorneys cannot remove under §1442, the Fifth Circuit decided an issue that was not before it, since the remand itself

was not appealed. As support, the Fifth Circuit cited a misapprehended version of a 1969 Supreme Court case.

To protect my clients, I personally paid $12,955 into the registry of the federal court, covering all fee-shifting and sanctions. In three years of this litigation, I have not collected any money in fees from these clients, so the money I lost was my own.

After remand, the state district court ruled against my clients and me, but the state appeals court reversed on all significant issues and threw out all of Howard's case; ordered that Howard pay me sanctions; and reinstated the reconventional demand. The Louisiana Fourth Circuit Court of Appeal had to analyze the application of federal law 28 USC §1367(d) to the state-law time-bar, as I predicted in my notice of removal, but they analyzed it correctly.[2] The Louisiana Supreme Court refused Howard's application for certiorari, and the defamation and malicious-prosecution action against my clients and me is finally dismissed.

CONTROLLING PRECEDENT

Martin v. Franklin Capital Corp. controls this case, and *Martin*, in turn, endorses a rule from the Fifth Circuit.[3] The Fifth Circuit regarded that *Cammer v. U.S.*[4] and *Willingham v. Morgan*[5] controlled the issue of attorney removal under §1442, which is disputed here.

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2. Appendix E, Supervisory Writ in *Howard v. St. Germain, et al.*, 09-1344 (La.App. 4 Cir. 1/26/2010) at pp.16a,18a–22a.

3. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005), *citing Hornbuckle v. State Farm Lloyds*, 03-10938 (CA5 9/10/2004) 385 F.3d 538, 541, *and Valdes v. Wal-Mart Stores, Inc.*, 99-20519 (CA5 1/12/2000) 199 F.3d 290, 293.

4. *Cammer v. United States*, 350 U.S. 399 (1956).

5. *Willingham v. Morgan*, 395 U.S. 402 (1969).

REASONS FOR GRANTING THE PETITION

A. Fifth Circuit ruled broadly that attorneys cannot remove under §1442, on a question not properly before that court.

The Fifth Circuit made a very broad ruling that attorneys cannot remove as officers of the court under 28 USC §1442, but that was not at issue in the appeal. The issue was §1447(c) fee-shifting, and whether I had a reasonable objective basis at the time of removal.

Although the Fifth Circuit's holding is sweeping, it does not address this actual appeal. Because the remand itself was neither appealed nor appealable, the propriety of the removal in absolute terms was not at issue. Also, because I stated other §1441 grounds for removal, which were overlooked, the §1442 question was not essential. Had the issue been properly before the court, several important questions would have been briefed and considered: (1) what effect does the extensive 1996 amendment of 28 USC §1442 have on officer-of-the-court removal; (2) does any caselaw in the half-century since *Cammer* have any effect; and (3) does the broad "acting under" language that expands 28 USC §1442(a)(1) removal to private persons[6] also apply to §1442(a)(2). The decision was rendered without the benefit of such information or deliberation, but the future implications of the decision are of exceptional importance, and certiorari is warranted.

B. Fifth Circuit seriously misapprehends *Willingham v. Morgan* (U.S., 1969).

The Fifth Circuit's published opinion seriously misapprehends and misstates *Willingham v. Morgan*[7], where the removing parties were a warden and a

6. *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007).

7. *Willingham v. Morgan*, 395 U.S. 402, 406-08 (1969).

medical officer at a federal prison, and where the Supreme Court's decision says nothing whatsoever about private attorneys or officers of the court. In the Fifth Circuit's opinion here, the synopsis of *Willingham* is "(interpreting the purpose of 28 U.S.C. § 1442 as applying to only those cases where a federal officer required a federal forum and not intended for a private attorney to use to remove a state action to federal court on the basis that he was an 'officer of the court')".[8] This is completely wrong, and was highly prejudicial to my appeal. The Fifth Circuit based the sweeping holding that attorneys cannot remove under §1442 on a completely-wrong synopsis of the *Willingham* case, which now sits in a published opinion that needs the corrective attention of this Supreme Court.

C. No controlling caselaw existed at the time of removal, as shown by *Herron*.

In *Herron v. Continental Airlines* the Fifth Circuit held a private process server could not remove under §1442. Removal by an attorney was not at issue, and the Fifth Circuit explicitly stated in footnote 2 "[w]e do not attempt to fashion a definition of "officer of the court," nor do we opine as to whether attorneys are 'officers of the courts of the United States' within the meaning of Sec. 1442".[9]

The Fifth Circuit opinion here does not explain how the 1956 Supreme Court case of *Cammer v. United States* controls any kind of removal, but it treats the *Cammer* opinion as settled caselaw giving me notice that removal was not available, notwithstanding (1) that *Cammer* says nothing at all about any kind of removal, (2) that there is no circuit-court caselaw

8. Appendix A, Circuit Court Opinion, p.3a.

9. *Herron v. Continental Airlines, Inc.*, 95-10645, note 2 (CA5 1/23/1996) 73 F.3d 57, 59.

anywhere applying *Cammer* to the question of an admitted attorney removing under §1442, and (3) that the Fifth Circuit's own *Herron* case acknowledges the question as being unresolved. *Cammer*'s holding was "[w]e hold that a lawyer is not the kind of 'officer' who can be summarily tried for contempt under 18 USC §401(2)."[10] *Cammer*'s reasoning, in part, was that an attorney is not an "officer of the court" within the ordinary meaning of that term. "Ordinary meaning" informs but does not control the meaning of that term in the text of the statute 28 USC §1442, and the Fifth Circuit was unwarranted in holding that it does.

In some different appeal— with the issue properly presented and briefed— a court might apply and extend the reasoning of the 1956 *Cammer* decision to synthesize a new holding that attorneys cannot remove under 28 USC §1442. Such a new holding would become controlling caselaw, which would put all attorneys *in the future* on notice that attempted removal was unreasonable. But such controlling caselaw did not exist on 5 May 2009 when I filed my Notice of Removal. The *Cammer* decision had nothing to do with removal, but the Fifth Circuit punishes me for failing to foresee that the *Cammer* decision might be extended a half-century later to disallow removal by attorneys, and punishes me twice by upholding the district court's fee-shifting, and then adding sanctions for a frivolous appeal. By doing so, the Fifth Circuit conflicts with both Supreme-Court and its own precedent,[11] which holds that the reasonable objective bases for removing must be analyzed as of the time of removal; that a

10. *Cammer v. United States*, 350 U.S. 399, 407-08 (1956).

11. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005), *citing Hornbuckle v. State Farm Lloyds*, 03-10938 (CA5 9/10/2004) 385 F.3d 538, 541, *and Valdes v. Wal-Mart Stores, Inc.*, 99-20519 (CA5 1/12/2000) 199 F.3d 290, 293.

court's discretion in awarding fees should be faithful to the law's purposes; and that the threat of fee-shifting should not be so strong as to discourage all but the most obvious removals. This conflict warrants certiorari.

D. Seventh-Circuit rule is rejected by the Fifth.

In the Seventh Circuit:

> As a general rule, if, at the time the defendant filed his notice in federal court, clearly established law demonstrated that he had no basis for removal, then a district court should award a plaintiff his attorneys' fees. By contrast, if clearly established law did not foreclose a defendant's basis for removal, then a district court should not award attorneys' fees.[12]

This rule is useful to courts and to attorneys trying to avoid sanctions. I briefed and urged the Seventh-Circuit rule on the district and circuit courts, who rejected it without comment. This makes a conflict between the Seventh and Fifth Circuits, warranting certiorari.

E. Other reasonable grounds for removal were asserted and supported, but overlooked.

Federal-officer removal under §1442 was only one of the grounds asserted and supported. The removal was also based on §1441 federal-question removal because of the question of 28 USC §1367(d) in the plaintiff's complaint when viewed as a well-pleaded complaint. A Constitutional issue— subsidiary to the other issues— was also identified. If the district and circuit courts had applied the proper standard and analyzed whether these other grounds for removal were reasonable, then the §1442 grounds would likely have been recognized as being not essential to an inquiry of whether the removal as a whole was reasonable.

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12. *Lott v. Pfizer, Inc.*, 06-3372 (CA7 6/25/2007) 492 F.3d 789, 793.

F. Neither the district court nor the Fifth Circuit applied the proper *Martin* standard.

The Fifth Circuit reverted to the older discretion standard of *Miranti v. Lee*[13], which has been superceded by *Valdes*[14] and *Hornbuckle*[15] in the Fifth Circuit, and by *Martin v. Franklin Capital Corp.*[16] everywhere.

The district court only cited the 1993 *Miranti* case, and declined to acknowledge the newer cases. The district court also declined to make any proper findings regarding reasonableness of any of the grounds for removal as required to support fee-shifting under the current caselaw, and instead based the fee-shifting award solely upon its "discretion upon a finding that removal is improper",[17] citing only *Miranti*. The Fifth Circuit acknowledged the existence of the *Martin*, *Valdes*, and *Hornbuckle* cases, but overlooked them and affirmed only on the basis of the district court's *discretion*, with citations to *Miranti* and to a 1996 district court case.[18]

In *Martin*, in 2005, the Supreme Court provided detailed guidance regarding discretion as it applies to §1447(c) fee-shifting.[19] The Fifth Circuit has overlooked this guidance and reverted to an older, outdated notion of discretion, which warrants certiorari here.

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13. *Miranti v. Lee*, 92-3576 (CA5 10/7/1993) 3 F.3d 925.

14. *Valdes v. Wal-Mart Stores, Inc.*, 99-20519 (CA5 1/12/2000) 199 F.3d 290, 293.

15. *Hornbuckle v. State Farm Lloyds*, 03-10938 (CA5 9/10/2004) 385 F.3d 538, 541.

16. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005).

17. Appendix D, District Court Order of 20 July 2009, p.7a.

18. Appendix A, Circuit Court Opinion of 5 March 2010, p.2a.

19. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005).

G. Appeal of quantum was overlooked, and no proper lodestar analysis was done by any court.

My appeal contained a detailed objection to specific hours claimed, where the impropriety of the hours are shown on the face of the billing, and with citation to the relevant Fifth Circuit precedent. This entire aspect of the appeal was overlooked. The district court failed to analyze and confirm the quantum of attorney fees in a proper lodestar analysis, but instead summarily endorsed the quantum because of the "vexatious" nature of the prior litigation. The Fifth Circuit overlooked this and let it stand, and by doing so was in conflict with its own precedent, which states "[w]e must determine whether the record clearly indicates that the district court has utilized the *Johnson* framework as the basis of its analysis, has not proceeded in a summary fashion, and has arrived at an amount that can be said to be just compensation"[20]. My detailed objection to the attorney fees awarded as Rule-38 sanctions was likewise overlooked, and none of the $12,955 I was sanctioned ever got a proper lodestar analysis by either of the courts, in conflict with Fifth Circuit precedent, and warranting certiorari here.

H. The Fifth Circuit's Rule-38 sanctions conflict with its own precedent.

Fifth-Circuit precedent states that an appeal of a novel or unresolved question or a question of first impression is not considered frivolous or sanctionable.[21] Whether an admitted attorney may remove as an

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20. *In re High Sulfur Content Gasoline Products Liab.*, 07-30384 (CA5 2/4/2008) 517 F.3d 220, 227 (internal quotes omitted).

21. *Macklin v. City of New Orleans*, 01-31039 (CA5 7/25/2002) 300 F.3d 552, 554; *Estiverne v. Saks Fifth Avenue*, 93-3317 (CA5 12/28/2002) 8 F.3d 1171, 1174.

"officer of the court" was a novel, unresolved question and an issue of first impression. Consequently the question actually at issue on appeal— whether I had a reasonable objective basis for removal at the time of removal— was also a novel, unresolved question and an issue of first impression. Therefore, existing Fifth Circuit precedent says that I should not have been sanctioned for a frivolous appeal, and the decision here imposing sanctions is in conflict with Fifth Circuit precedent, warranting certiorari.

CONCLUSION

Because the district and circuits courts did not apply the proper standard in awarding fee-shifting on remand, and did not apply a proper lodestar analysis to the quantum of award, and because the circuit court declined to follow the rule of another circuit, and did not follow its own precedent in ordering Rule-38 sanctions, and because the circuit court has made a broad ruling on an issue not properly on appeal before it, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted:

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Appendix A, Circuit Court Opinion of 5 March 2010 . . . . . 1a

Appendix B, Circuit Court Denial of Rehearing 13 April 2010 . . 5a

Appendix C, District Court Minute Order of 24 June 2009 . . . 6a

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APPENDIX A, CIRCUIT COURT OPINION

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-30642
Summary Calendar

Filed March 5, 2010
Charles R. Fulbruge III, Clerk

D DOUGLAS HOWARD, JR.,
Plaintiff - Appellee
v.
LESLEY SIMMONS ST. GERMAIN, ET AL
Defendants - Appellants

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:09-cv-03450

Before BENAVIDES, PRADO, SOUTHWICK, Circuit Judges.

PER CURIAM:

Defendants-Appellants Mark Edw. Andrews, Lesley Simmons St. Germain, and David E. Simmons ("Appellants") appeal the imposition of fee-shifting by the district court. Plaintiff-Appellee D. Douglas Howard ("Appellee") sued the Appellants in state court for defamation, and the Appellants removed the case to federal court. After hearing arguments on the issue, the district court remanded the case to state court and assessed attorney's fees against Appellants under 28 U.S.C. § 1447(c). Appellants do not seek review of

the district court's decision to remand. *See* 28 U.S.C. § 1447(d). Thus, we only consider the district court's decision to impose liability on all Appellants for Appellee's legal fees.

We review a district court's award for attorney's fees under the deferential abuse of discretion standard. *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 541 (5th Cir. 2004). Subsidiary factual findings underlying this award are reviewed for clear error. *League of United Latin Am. Citizens No. 4552 (LULAC) v. Roscoe Indep. Sch. Dist.*, 119 F.3d 1228, 1232 (5th Cir. 1997). The decision to impose any fee award against one or all the Defendants, jointly and severally, is within the court's discretion. *See, e.g., Park Nat. Bank of Houston v. Kaminetzky*, 976 F. Supp. 571, 584 (S.D. Tex. 1996). Section 1447(c) permits a district court to award "just costs and any actual expenses, including attorney's fees" that are incurred as a result of the removal. 28 U.S.C. § 1447(c); *see also Miranti v. Lee*, 3 F.3d 925, 927-28 (5th Cir. 1993) (stating that both costs and attorney's fees against the removing party may be imposed if the court finds that removal is improper under § 1447(c)). The Supreme Court in *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005) noted that courts may award attorney's fees when the removing party lacks an objectively reasonable basis for removal. Similarly in *Hornbuckle*, we stated that attorney's fees should be denied if an objectively reasonable basis exists. *See Hornbuckle*, 385 F.3d at 541.

The district court did not err in assessing attorney's fees against the Appellants. Appellants argue that their removal is supported by reasonable grounds because he is an officer of the court and because his case raises a constitutional question. While Section 1442 permits a pending state action to be removed for "any officer

of the courts," the district court correctly found that Andrews was not an officer of the court in this context. The Supreme Court in *Cammer v. United States*, 350 U.S. 399, 405-08 (1956), determined that an attorney is not an officer of the court within the ordinary meaning of that term. *See also Ex parte Garland*, 71 U.S. 333, 378 (1866). In *Cammer*, the Court reversed the lower court's order because a contempt finding under 18 U.S.C. § 401 could only be assessed against "officers" of the federal courts. *See Cammer*, 350 U.S. at 408; *see also Willingham v. Morgan*, 395 U.S. 402, 406-08 (1969) (interpreting the purpose of 28 U.S.C. § 1442 as applying to only those cases where a federal officer required a federal forum and not intended for a private attorney to use to remove a state action to federal court on the basis that he was an "officer of the court").

Moreover, in the instant case, a constitutional question was not raised by the petition's state claims nor did the prior RICO legislation raise a federal question. Thus, the district court did not abuse its considerable discretion in taxing costs and attorney's fees to Appellants because an objectively reasonable basis for removal did not exist.

Appellee has moved under Rule 38 for sanctions and double costs and attorney's fees against Appellants. Federal courts have inherent power to impose sanctions for abuse of the judicial process. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991). Rule 38 of the Federal Rules of Appellate Procedure authorizes an award of "just damages and single or double costs to the appellee" if we determine that an appeal is frivolous. *See Buck v. United States*, 967 F.2d 1060, 1062 (5th Cir. 1992). An appeal is frivolous if "the result is obvious or the arguments of error are wholly without merit." *See id.* (quoting *Coghlan v. Starkey*, 852 F.2d 806, 811 (5th

Cir. 1988)). We recently considered a similar request by Appellee in litigation involving these parties in *St. Germain v. Howard*, 556 F.3d 261, 264 (5th Cir. 2009) ("*Howard I*"). In *Howard I*, we dismissed the Appellant's appeal concerning their RICO suit brought against Appellee and two law firms with which he is affiliated without imposing sanctions. *See id.* at 264. However, we noted that it was a "close case" on our decision to deny sanctions because the Appellants did not clearly present a cognizable civil RICO claim. *Id.* Here, we impose sanctions of double costs and attorney's fees against Appellant. Supreme Court cases exclude a private attorney from the meaning of "officer of the court," and the district court found Appellant's "officer of the court" argument to be a ridiculous, "farfetched notion." Appellants were on notice that the overruling of objections to remand was an obvious result when they were unable to support their argument at the district court. This appeal is frivolous for purposes of Rule 38.

For the foregoing reasons, we AFFIRM the judgment of the district court and GRANT the motion for sanctions and double costs and attorney's fees.

APPENDIX B, CIRCUIT COURT DENIAL OF REHEARING

Case: 09-30642 [...] Date Filed 4/13/2010

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-30642

D DOUGLAS HOWARD, JR.,
Plaintiff - Appellee

v.

LESLEY SIMMONS ST. GERMAIN, HILLARY ROSE HILLYER, formerly known as Hillary Rose Smith; MELISSA BRANIGHAN LUMINAIS; MARK EDWARD ANDREWS; ANDREWS ARTS & SCIENCES LAW, LLC; DAVID E. SIMMONS, D.D.S.,
Defendants - Appellants

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING EN BANC

Before BENAVIDES, PRADO, SOUTHWICK, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
s/ FORTUNATO P. BENAVIDES
United States Circuit Judge

APPENDIX C, DISTRICT COURT MINUTE ORDER

MINUTE ENTRY
BARBIER, J.
JUNE 24, 2009
JS-10: 40 min.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

D. DOUGLAS HOWARD JR. — CIVIL ACTION NUMBER: 09-3450

VERSUS — SECTION: J

LESLEY SIMMONS ST. GERMAIN, ET AL

COURTROOM DEPUTY: EILEEN STENSRUD — COURT REPORTER: CATHY PEPPER

WEDNESDAY, JUNE 24, 2009 9:30 A.M.
JUDGE CARL J. BARBIER PRESIDING

PLAINTIFF'S MOTION TO REMAND TO STATE COURT (17)

Argued; ORDERED GRANTED.

IT IS FURTHER ORDERED that the amount of attorneys fees and costs associated with filing this motion be assessed to Mark Andrews, defendants' counsel.
Plaintiffs are to file a motion for fees and costs by JULY 6, 2009. Traverse to this motion is to be filed by JULY 13, 2009.

ATTORNEYS: D. Douglas Howard Jr., Esq. & Shawn C. Reed, Atty at Law, for plaintiff
Mark Andrews, Esq., for defendants

APPENDIX D, DISTRICT COURT ORDER

Case: 2:09-cv-3450-CJB-KWR Doc. 63 Filed 7/20/2010

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

D. DOUGLAS HOWARD, JR.	CIVIL ACTION
VERSUS	NUMBER: 09-3450
ST. GERMAIN ET AL	SECTION: J(4)

ORDER

Before the Court is Plaintiff's Motion for Attorney's Fees (Rec. Doc. 59), filed in accordance with the Court's ruling in open-court on June 24, 2009, which granted Plaintiff's motion to remand the above-captioned matter and awarded attorney's fees and costs under 28 U.S.C. § 1447(c) in connection with Defendants' wrongful removal of this case. Plaintiff avers that no costs were incurred in the filing of the motion to remand, and thus he seeks only a reasonable attorney's fee in the present motion. The Defendants' opposition attempts in large part to argue against the validity of the Court's determination that a fee award is warranted in the present circumstances. As the Court has already made its determination as to the propriety of an award under § 1447(c), the Court will not address Defendants' arguments that such an award is improper.

To the extent Defendants oppose the quantum of Plaintiff's requested award, the Court finds that Defendants' arguments are unavailing. Under the provisions of § 1447(c), "[a]]n order remanding [a] case may require payment of just costs and any actual expenses, including attorney's fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). "[T]he imposition of both costs and attorneys' fees against the removing party may be awarded in the Court's discretion" upon

a finding that removal is improper under § 1447(c). *Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993).

The Fifth Circuit adheres to the "lodestar" method for calculating reasonable attorneys' fees in the context of an award under § 1447(c). *Halliburton Latin America SA v. Intern. Technical Solutions*, 273 F.3d 392, 392 (5th Cir. 2001). This method requires the district court to "determine the reasonable number of hours expended on the litigation and the reasonable hourly rate for the participating lawyers" based on "contemporaneous billing records or other sufficient documentation so that the district court can fulfill its duty to examine the application for noncompensable hours." *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995). "A lodestar is calculated by multiplying the number of hours reasonably expended by an appropriate hourly rate in the community for such work." *Heidtman v. County of El Paso*, 171 F.3d 1038, 1043 (5th Cir. 1999). The lodestar is presumed to be the reasonable fee, but it may be adjusted after considerations of the factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974), overruled on other grounds, *Blanchard v. Bergeron*, 489 U.S. 87 (1989). *Gonzalez v. Associates Health & Welfare Plan*, 2002 WL 31933208, 1 (5th Cir. 2002).

In this case, Plaintiff has requested a fee award in the amount of $7,088.00, which the Court finds to be appropriate in light of the hours reasonably expended and the hourly rate charged in procuring a remand of this matter. The Court notes that the $7,088.00 fee award is especially appropriate in light of the two-year history of vexatious litigation against Plaintiff by the Defendants in this matter, which has already nearly resulted in sanctions against Defendants on two prior occasions. See Civil Action No. 07-9040, Rec. Docs. 33

and 39. Additionally, the Court notes that Defendants' various grounds for removal - while ultimately baseless - were wide-ranging and complicated, and thus required significant effort by counsel for plaintiff.

Finally, to the extent that Defendant Andrews argues that an award of $7,088.00 against him *individually* would be financially ruinous, the Court notes that it is within the Court's discretion to impose any fee award against all the Defendants, jointly and severally, as parties to the improper removal. See, e.g., *Park Nat. Bank of Houston v. Kaminetzky*, 976 F. Supp. 571, 584 (S.D. Tex. 1996). Thus, Andrews' arguments related to his individual financial situation are irrelevant.

As such, the Court finds that Plaintiff's requested fee award of $7,088.00 is reasonable in the circumstances of this case. Accordingly,

IT IS ORDERED that Plaintiff's Motion for Attorney's Fees (Rec. Doc. 59) is hereby GRANTED. Plaintiff is hereby awarded $7,088.00 under 28 U.S.C. § 1447(c) as a reasonable attorney's fee for the remand of this matter, to be paid by Defendants Lesley Simmons St. Germain, Hillary Rose Hillyer, Melissa Branighan Luminais, Mark Edward Andrews, Andrews Arts & Sciences Law, LLC, and David E. Simmons, jointly and severally.

New Orleans, Louisiana this 20th day of June, 2009.

s/ CARL J. BARBIER
UNITED STATES DISTRICT JUDGE

[*note— signing date was 20 July 2009*]

APPENDIX E, SUPERVISORY WRIT (La.App.)

[*26 Jan. 2010*]

NO. 2009-C-1344

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

D. DOUGLAS HOWARD JR.
VERSUS
LESLEY SIMMONS ST. GERMAIN, HILLARY ROSE SMITH, MELISSA BRANIGHAN, MARK EDW. ANDREWS, ANDREWS ARTS & SCIENCES LAW, LLC & DAVID E. SIMMONS, DDS

IN RE: LESLEY SIMMONS ST. GERMAIN, HILLARY ROSE SMITH, MELISSA BRANIGHAN, MARK EDW. ANDREWS, ANDREWS ARTS & SCIENCES LAW, LLC & DAVID E. SIMMONS, DDS

APPLYING FOR: SUPERVISORY WRITS

DIRECTED TO: HONORABLE LLOYD J. MEDLEY, JR., CIVIL DISTRICT COURT, ORLEANS PARISH, DIVISION "D-16", 2009-2267

WRIT GRANTED IN PART;
WRIT DENIED IN PART

Attorney D. Douglas Howard brought this defamation action against three former clients, their attorney, Mark Andrews, and the father of one of the clients, David E. Simmons. Thereafter, although not necessarily in this order, Mr. Howard filed a motion to disqualify defendants' attorney, exceptions of prescription and res judicata, and an ex parte motion directing defendants to pay security costs, while the defendants, jointly, filed a special motion to strike, reconventional demand, and counter motion to strike order for security for costs. The defendants also filed a motion for contempt against Mr. Howard that the district court did not hear, but instead, set for hearing on October 16, 2009.

On September 4, 2009, following a contradictory hearing on the various motions, the district court granted all of Mr. Howard's motions, denied the defendants' motions, and dismissed their reconventional demand. This ruling was memorialized on September 10, 2009, when the district court signed the following three judgments which:

(1) ordered that Mark Andrews be disqualified from representing all of the defendants except himself,

(2) granted Mr. Howard's exceptions of prescription and res judicata, dismissing all of the defendants' claims with prejudice, and

(3) denied attorney Mark Andrews' special motion to strike dated March 18, 2009, and amended motion to strike dated June 26, 2009. Defendants now seek supervisory review of these judgments. On October 15, 2009, the plaintiff filed a motion requesting additional time to file a response and a motion to dismiss the instant writ application as untimely, unauthorized, and improperly filed. Specifically, plaintiff argues that the abovementioned writ application should be dismissed because it does not comply with Rules 4-4(C)[1]

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1. Uniform Rules, Court of Appeal, Rule 4-4(C) provides:

In all applications requesting a stay order or other priority consideration, the applicant must certify in affidavit form that the trial court and all counsel and unrepresented parties have been notified by telephonic or other equally prompt means of communication that said writ application has been or is about to be filed and that said application has been served forthwith on the trial court and all parties at interest or their counsel, by means equal to the means used to effect filing with the appellate court. (That is, if filing with the appellate court is by overnight mail, the same means shall be employed for service on the trial court and all palties at interest or their counsel. If filing is by hand to the appellate court, service must be made on the trial court and all patties at interest or their counsel by an equally prompt means.)

and 4-5[2] of the Uniform Rules - Courts of Appeal,

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2. Uniform Rules, Courts of Appeal, Rule 4-5 provides:

The original application for writs shall be signed by the applicant or counsel of record, and shall contain an affidavit verifying the allegations of the application and certifying that a copy has been delivered or mailed to the respondent judge and to opposing counsel, and to any opposing party not represented by counsel. The affidavit shall list all parties and all counsel, indicating the parties each represents. The affidavit also shall list the addresses and telephone numbers (if available) of the respondent judge, opposing counsel and any opposing pariy not represented by counsel. The original and duplicates shall have the pages of the application and attached documents and exhibits consecutively numbered: the entire submission shall be hole punched and bound in two places along the top margin, preferably with 4 1/4 inch metal file fasteners such that no part of the text on any page is obscured, and in sections consisting of no more than 250 pages; and the submission shall contain these items:

(A) an index of all items contained therein;

(B) a concise statement of the grounds on which the jurisdiction of the court is invoked;

(C) a concise statement of the case, including the status of the case at the time the writ application is filed, in order to reflect any trial dates or hearing dates that are pending;

(D) the issues and questions of law presented for determination by the court;

(E) the assignments or specifications of errors and a memorandum in support of the application. in accordance with Rules 2-12.2 and 2-12.10, and a prayer for relief;

(F) a copy of the judgment, order, or ruling complained of (if by written judgment, order, or ruling);

(G) a copy of the judge's reasons for judgment, order, or ruling (if written);

(H) a copy of each pleading on which the judgment, order, or ruling was founded, including the petition(s) in civil cases and the indictment or the bill of information in criminal cases;

(I) a copy of pertinent court minutes; and

(J) the notice of intent and return date order required by Rules 4-2 and 4-3.

(K) A separate page entitled 'REQUEST FOR EXPEDITED CONSIDERATION' and indexed as such shall be included if the

because it does not contain: (1) a signature, (2) an affidavit of notification or affidavit verifying the allegations, as required by Rule 4-4(C) and 4-5, respectively, (3) evidence that the applicant notified the other defendants that this application was filed on their behalf, one of whom has retained new counsel, and (4) evidence of notice to Shawn Reed, plaintiffs co-counsel/counsel of record. Alternatively, plaintiff argues that issues raised by defendants regarding the district court's ex parte order for security for costs dated August 25, 2009, should be dismissed because a return date was never requested and the thirty day time period has expired. The plaintiffs argument is overstated, as plaintiff signed the petition but failed to provide an order enrolling Shawn Reed. However, Shawn Reed appeared of record at the hearing, along with Joanne Rinardo, plaintiffs attorney on the reconventional demand. The remaining arguments of plaintiff are without merit because the original writ application is signed as required by Rule 4-5, the ex parte order for security for costs dated August 25, 2009, is timely as defendants' opposition was denied on September 10, 2009, and the ruling on the motion to disqualify is presented for review herein. The request for expedited consideration was denied, so issues related to Rule 4-4(C) are moot.

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applicant seeks expedited relief or a stay order as required by Rule 4-4(B) and a corresponding affidavit as required by Rule 4-4(C).

(L) If any trial or hearing date is set after a writ application is filed or if any trial or hearing date included in a filed writ application is changed or continued, the applicant shall notify the court by facsimile or by email, if directed by the Court of Appeal, of the setting, change, or continuance of the hearing date no later than three business days after the setting, change or continuance. The filed writ application shall be supplemented with this information not later than one week after the setting, change or continuance.

The defendants complied with the Uniform Rules - Courts of Appeal, Rules 4-2 and 4-3, by simultaneously notifying the judge and parties of their intent to apply for supervisory writs, requesting a return date by oral motion in open court immediately after the hearing, and timely filing this writ application on the return date of October 5, 2009, in compliance with Rule 4-5, except for several deficiencies, noted above. On October 22, 2009, the defendants filed a supplement to the writ application as evidence of having corrected the noted deficiencies, and filed an opposition to the motion to dismiss on October 26, 2009. Accordingly, the plaintiffs motion to dismiss the instant writ application is denied.

The current course of events commenced when Lesley Simmons St. Germain, Hillary Rose Smith, and Melissa Branighan, three former clients of attorney D. Douglas Howard, joined together and sued him in federal court alleging a pattern of behavior that violated the federal civil RICO statute. Finding no claim under RICO, the federal court dismissed the complaint, without prejudice, and directed that the state law pendant claims should be heard by the state court. But, before his former clients filed any action in state court, Mr. Howard filed the instant action for defamation against them, their attorney, Mark E. Andrews, his law practice, Andrews Arts & Sciences Law, LLC, and David E. Simmons, DDS, the father of former client Lesley Simmons St. Germain.

In the instant suit, Mr. Howard is seeking damages for injuries he allegedly sustained to his personal and professional reputation as a result of alleged defamatory publications made by the defendants, malicious prosecution of these claims, and abuse of process. In summary, Mr. Howard alleges that the defendants injured his personal and professional reputation,

caused him humiliation, embarrassment, mental and emotional distress, lost business opportunities, and loss of enjoyment of life. He alleges that these damages were caused by the former clients publishing defamatory communications in legal proceedings filed against him for malpractice, their attorney by representing them in said proceedings, and St. Germain's father by providing her with financial assistance.

Specifically, Mr. Howard alleges that the defendants produced the following malicious publications:

(1) Lesley Simmons St. Germain by filing a(n) (i) answer to Howard's suit on open account, (ii) petition for nullity, (iii) suit for malpractice, (iv) RICO action, and (v) reconventional demand in the case at bar, in which she alleged Mr. Howard breached their contract, performed unauthorized work, over-billed, fraud, inadequate representation, failure to prosecute, exerting duress and undue influence by bullying, yelling, and threatening to withdraw with a pending court date;

(2) Hillary Hillyer Smith by filing the RICO action in which she alleged that Mr. Howard breached their contract by conducting her divorce with complete disregard for her clearly stated wishes and committed malpractice by his abrupt, unlawful withdrawal;

(3) Melissa Branighan Luminais by filing the RICO action in which she alleged that Mr. Howard committed legal malpractice, breach of contract, and over billing for unauthorized work;

(4) Attorney Mark Andrews by initiating and persisting in prosecuting the afore-mentioned actions on behalf of these former clients; and

(5) David Simmons by maliciously conspiring with the attorney and former clients in their campaign to

tarnish Mr. Howard's reputation and by paying for the services of numerous attorneys, presumably on behalf of his daughter, for this purpose.

Mr. Howard amended his petition to add allegations of malicious prosecution, abuse of process, and conspiracy, and defendants filed a joint answer and reconventional demand. Next, plaintiff moved to disqualify Mark Andrews as the defendants' attorney for an alleged conflict of interest, and defendants filed a special motion to strike the allegations related to the alleged conflict. Defendants opposed plaintiff's exceptions of prescription and res judicata, and filed a counter motion to strike plaintiff's ex parte order for defendants to pay security for costs, and then filed a motion for contempt.

With the exception of the motion for contempt that was set for hearing on October 16,2009, the district court heard argument on all motions on September 4, 2009, and immediately thereafter issued the aforementioned three judgments.

Asserting error by the district court, defendants have raised the following issues for review:

1. Whether the judgment granting exceptions of prescription and res judicata, and dismissing defendants' reconventional demand:

a. Whether defendants' reconventional demand was properly dismissed where it consists essentially of state-law claims formerly brought as pendant claims to an action in federal court that were dismissed, without prejudice, by the federal court in order to be refiled in state court, in light of 28 U.S.C. § 1367(d) and La. R.S. 9:5605.

b. Whether defendants' reconventional demand was properly dismissed where, it contains a subset of

claims that could theoretically have been brought as a permissive, not compulsory, reconventional demand to a suit on open account when a default judgment was taken, limiting the preclusive effect of the default judgment to its own narrow terms.

2. Whether the judgment denying defendants' special motion to strike, under La. C.C.P. art. 971:

a. Whether, under La. C.C.P. art. 971, a plaintiff can establish a "probability of success" without sufficient evidence of the required elements of his claims for defamation, malicious prosecution, and emotional distress.

b. Whether, under La. C.C.P. art. 971, a special motion to strike was properly denied where the defendants' constitutional right to petition was established, and the plaintiff failed to establish a probability of success on every element of these claims.

c. Whether, under La. C.C.P. art. 971, attorney's fees and costs requested by defendants were properly denied, when defendants established a constitutional right to petition, and plaintiff failed to establish a probability of success on every required element of these claims.

3. Whether the judgment disqualifying Mark Andrews as attorney for the co-defendants:

a. Whether a plaintiff has standing to assert a conflict of interest among co-defendants and their attorney because the defendants' attorney has been made a co-defendant, where the co-defendants did not assert a conflict, the attorney is prevented from testifying against the codefendants' interests by the continuing duties of confidentiality and loyalty, and the attorney-testimony rule only operates to restrict an attorney from being an advocate at trial, and does not operate to disqualify an attorney.

b. Whether the district court properly disqualified Mark Andrews from representing his own solo-practice law firm, which was made a co-defendant, when plaintiff did not motion the court to do so.

4. Whether the district court properly granted the plaintiff's ex parte motion for security costs under La. R.S. 13:1215 and ordered the defendants in the main action to pay security costs of $6,500, which the statute states can only be required from the plaintiff in the main action and demanded by the defendant in the main action, regardless of whether or not any reconventional demand is filed.

DISCUSSION

I. EXCEPTIONS

Exception of Prescription

The first judgment presented for review granted the plaintiffs exceptions of prescription and res judicata, and dismissed all claims made by defendants with prejudice.

The defendants argue that the claims asserted in their reconventional demand are not prescribed because under Louisiana law, the filing of a claim in any court of competent jurisdiction interrupts prescriptive periods, and that the claims for legal malpractice and breach of contract were formerly pending in federal court. Federal law, specifically, 28 U.S.C. § 1367(d), controls the time for refilling pendant state claims dismissed from federal court and tolls the state law limitation periods. The defendants argue that their claims are not prescribed because under 28 U.S.C. § 1376(d), the claims were tolled while the RICO action, dismissed on March 6, 2008, was pending on appeal, and as the appellate court's ruling was issued on February

11, 2009, their claims were timely filed in state court on March 3, 2009. Defendants also argue that their claims are compulsory under La. C.C.P. art. 1061.

The plaintiff filed an exception of prescription on grounds that the defendants' claims were prescribed before the RICO action was filed in federal court, and at the latest, thirty days after it was dismissed.

The general rule is that the peremptory exception may be pleaded at any stage of the proceeding in the trial court prior to a submission of the case for a decision. La. C.C.P. art. 928. The standard of review on an exception of prescription is manifest error when the trial court makes its ruling based on factual determinations. *In re Noe*, 2004-0760, p. 4 (La.App. 4 Cir. 8/3/2005), 916 So.2d 1138, 1140. The trier of fact is afforded great discretion. *Turnbull v. Thensted*, 99-0025, p. 4 (La.App. 4 Cir. 3/1/2000), 757 So.2d 145, 149. Therefore, an appellate court may only reverse the finding of the trial court if a reasonable factual basis for the findings does not exist and those findings are manifestly erroneous. *In re Noe*, 916 So.2d at 1140. However, when the appellate court finds that there is a reversible error of law, we must redetermine the facts de novo from the entire record and render a judgment on the merits. *Perez v. Shook*, 97-0420, p. 5 (La.App. 4 Cir. 12/3/97), 703 So.2d 821, 826.

The RICO action and pendant state law claims were filed in the federal district court on November 20, 2007. After being dismissed on March 6, 2008, the defendants filed an appeal. On June 20, 2008, the district court granted plaintiff's motion for attorney's fees and ordered the defendants (St. Germain, Hillyer, Luminais, Andrews, Andrews' law practice, and Simmons) to pay $7,088.00 to plaintiff.

Federal jurisdiction over pendant state claims is governed by 28 U.S.C. § 1367. When a district court dismisses the federal claims serving as the basis for its jurisdiction and elects not to exercise supplemental jurisdiction over state law claims, the unadjudicated pendant state law claims must be dismissed without prejudice to allow the plaintiff to refile in state court. *Davison v. Weston*, 2003 WL 21350344, p. 1 (N.D.Tex.), 6/30/2003, citing *Bass v. Parkwood Hosp.*, 180 F.3d 234,246 (5th Cir. 1999).

The defendants argue that their reconventional demand should not have been dismissed because it contained a subset of claims that could theoretically have been brought as a permissive, but not compulsory, reconventional demand to a suit on open account, but where a default judgment before answer was taken in the suit on open account, limiting the preclusive effect of such default judgment to its own narrow terms.

La. R.S. 9:5605 is the defining authority on legal malpractice and limits an action for damages to one year from the date of the alleged negligence, or within one year from the date that the alleged negligence is or should have been discovered, but not more than three years from the date of the negligence regardless of when it is discovered. Once this period has passed the right of a claimant to begin an action for malpractice is extinguished. This authority is supported by subsequent case law. *Turnbull*, 99-0025, p. 3, 757 So.2d at 150, states "Prescription commences to run when a claimant knew or should have known of the existence of facts that would have enabled him to state a cause of action for legal malpractice", citing *Olivier v. Poirier*, 563 So.2d 1227 (La.App. 1 Cir. 1990).

In addressing the issue of prescription on the face of the petition, the court in *Taussig v. Leithead*, 96-

960, p. 10 (La.App. 3 Cir. 2/19/97), 689 So.2d 680, 686, stated that "[t]he burden of proof is normally on the party pleading prescription. Prescription begins to run at the time a claimant knew or should have known of the existence of facts that enable him or her to state a cause of action for legal malpractice. When, however, the plaintiffs petition on its face indicates that prescription has run, the burden shifts to the plaintiff to show why the claim has not prescribed."

Plaintiff argues that the defendants' claims are prescribed, but presented no evidence to support this claim. Instead, he merely alleges that his representation of Hillyer ended on June 5, 2006, St. Germain on November 21, 2006, and Luminais in October 2007. However, La. R.S. 9:5605 also provides that the claim may be filed "within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered." While the statute also allows for suspension of the running of this one-year period until the negligent conduct is "discovered or should have been discovered," this is a showing that the plaintiff must bear.

The federal complaint was filed on November 20, 2007, so St. Germain's claim for malpractice is not prescribed; but Hillyer's and Luminais' malpractice claims appear prescribed on their faces.

> Thus, if the defendant shows that, on the face of the petition, the action has prescribed by the passage of more than one year from the date of the act or omission which constitutes the alleged malpractice, it becomes the plaintiffs burden to prove that the action is not prescribed. As we interpret this statute, this may be done by showing that facts constituting malpractice were not discovered nor should not

> have been discovered until less than one year before suit was filed.

Taussig, 96-960, p.11, 689 So.2d at 686.

The defendants argue that La. R.S. 9:5605 exempts their claims for malpractice asserted in their reconventional demand because they were defrauded by the plaintiff under La. C.C.P. art. 1953. In *Coffey v. Block*, 99 1221 (La.App. 1 Cir. 6/23/2000), 762 So. 2d 1181, the court held that the fraud allegations of the plaintiffs petition were sufficient for purposes of La. R.S. 9:5605, where the plaintiff alleged that her attorney misrepresented the status of a prescription issue with the intent to obtain an unjust advantage over her, and to cause the loss of her cause of action against him for malpractice. Nevertheless, the party pleading fraud must allege with particularity the circumstances constituting fraud. *Fenner v. DeSalvo*, 2001-2223, p. 6 (La.App. 4 Cir. 4/17/2002), 826 So.2d 39, 44.

The defendants' breach of contract claim is not prescribed because under La. C.C. Art. 3499, the prescriptive period for a breach of contract claim is ten years from the date when the cause of action arose. *Simmons v. Templeton*, 97-2349 (La.App. 4 Cir. 11/10/98), 723 So.2d 1009. Claims under a contract prescribe ten years from the date they arise rather than from the date of the contract. *Scobee v. Lewis*, 264 So.2d 704,708 (La.App. 1 Cir 1972). Ten years have not elapsed since the initiation of the defendants' employment contracts with the plaintiff. Thus, the claims for breach of contract asserted by defendants Hillyer, Luminais, and St. Germain are not prescribed.

Exception of Res Judicata

A cause of action arising out of the same subject matter as a pending suit must be asserted in the pending suit to avoid the risk of the cause of action

being res judicata. If the cause of action is not asserted and the pending suit is finally decided in favor of the defendant, all causes of action that existed at the time of the final judgment that arose out of the transaction or occurrence that was the subject matter of the pending suit are barred. *Tower Partners, LLC v. Wade*, 2003-0665, p. 3 (La.App. 4 Cir. 1/21/2004), 869 So.2d 126, 133. However, defendant St. Germain apparently voluntarily dismissed the claims filed against Mr. Howard, without prejudice in the matter entitled *St. Germain v. Howard*, case no. 2007-6516, Civil District Court, on September 28, 2007. Accordingly, those unresolved claims are not res judicata.

The standard of review for the peremptory exception of res judicata requires this Court to determine if the "trial court's decision is legally correct or incorrect." *Glass v. Alton Ochsner Med. Found.*, 2004-1824, p. 5 (La.App. 4 Cir. 6/1/2005), 907 So.2d 782, 785. If the decision of the district court is based on an erroneous application of law rather than on a valid exercise of discretion, the decision is not entitled to deference by the reviewing court. *Kem Search, Inc. v. Sheffield*, 434 So.2d 1067, (La. 1983); *Glass*, 2002-0412, p. 4, 832 So.2d at 406. Louisiana law provides "[t]he doctrine of res judicata is stricti juris and any doubts concerning the application of this principle must be resolved against its application." *Alonzo v. State of Louisiana, ex rel. Dep't of Natural Resources*, 2002-0527, p. 8 (La. App. 4 Cir. 9/8/2004); 884 So.2d 634, 638.

Res judicata applies when a final judgment precludes the same parties from reasserting the same claims in subsequent litigation. The district court erred in granting plaintiff's exception of res judicata and dismissing defendants' reconventional demand because the record does not indicate that defendants' claims for

breach of contract, fraud, and legal malpractice were previously adjudicated. Specifically, plaintiff's suit on open account is not related to the instant case, so the default judgment issued in that matter has no bearing in this matter. The federal court did not rule on the state pendant claims asserted in the RICO action, but simply dismissed them so that they could be reasserted in state court.

II. SPECIAL MOTION TO STRIKE

The second judgment raises issues surrounding the denial of defendants' special motion to strike under La. C.C.P. art. 971, which defendants argue was an error of law because the district court applied the wrong standard in reaching its decision, and the plaintiff failed to show a probability of success on all essential elements of his claims.

Appellate courts review special motions to strike using the de novo standard of review because it involves issues of law and examines whether the trial court was legally correct. *Melius v. Keiffer*, 2007-0189, p. 2 (La. App. 4 Cir. 3/12/2008), 980 So.2d 167, 170. The burden of proof begins with the party filing the motion to strike to prove that "the cause of action arises from an act in the exercise of his right of free speech regarding a public issue." *Aymond v. Dupree*, 2005-1248, p. 7, (La.App. 3 Cir. 4/12/2006) 928 So.2d 721, 727. Once proven, the plaintiff must then demonstrate a probability of success on the claim. *Id.* In determining whether the plaintiff established a probability of success on his claims, the court will "consider the pleadings and supporting and opposing affidavits." La. C.C.P. art. 971(A)(2). *Melius*, 2007-0189, p. 3, 980 So.2d at 171.

The special motion to strike is authorized by La. C.C.P. art. 971, which the Louisiana legislature enacted "to screen out meritless claims pursued to chill one's

constitutional rights under the First Amendment of the United States Constitution to freedom of speech and press." *Lee v. Pennington*, 2002-0381, p. 4 (La.App. 4 Cir. 10/16/2002), 830 So.2d 1037, 1041. It is also known as the anti-SLAPP statute. This article was enacted in Section 1 of Acts 1999, No. 734. Section 2 of this act provides:

> The legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances. The legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, it is the intention of the legislature that the Article enacted pursuant to this Act shall be construed broadly.

In the instant case, the plaintiff has sued the defendants for defamation, malicious prosecution, abuse of process, and conspiracy. The defendants argue that the plaintiff's causes of action arise from the defendants' acts in furtherance of their constitutional right to petition, and as the plaintiff has failed to establish a probability of success on every required element of his claim, they are entitled to an award for attorney's fees and costs under La. C.C.P. art. 971. The defendants are correct. The district court erred in denying the defendants' award of attorney's fees.

Defamation

The essential elements of a defamation action are: defamatory words; publication or communication to a person other than the one defamed; falsity; malice,

actual or implied; and injury. *Williams v. Touro Infirmary*, 578 So.2d 1006, 1009 (La.App. 4 Cir. 1991). A communication, although defamatory, may be protected under a qualified privilege if the statement is made in good faith and without malice. *Melancon v. Hyatt Corp.*, 589 So.2d 1186 (La.App. 4 Cir. 1991). "Good faith" in this sense means the party making the statement had reasonable grounds for believing that the statement was true. *Id.* at 1189. "Without malice" means that the statement was made without knowledge of its falsity or without reckless disregard for the truth. *Adserv Corp. v. Lincecum*, 385 So.2d 432 (La.App. 1 Cir. 1980). To be privileged, an otherwise defamatory statement must be made in good faith on any subject matter in which the person communicating has an interest or in reference to which he has a duty, to a person having a corresponding interest or duty. *Melancon*, 589 So.2d at 1189, *citing Toomer v. Breaux*, 146 So.2d 723 (La.App. 3 Cir. 1962).

In order to prevail on a defamation claim, the plaintiff must prove all of the following five elements by a preponderance of the evidence: (1) a false or defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and, (4) resulting injury. *Melius*, 2007-0189, p. 5 (La.App. 4 Cir. 3/12/2008), 980 So.2d 167, 172. If even one of these elements is absent, the cause of action fails. *Sommer v. State, Dept. of Transp. and Development*, 97-1929, p. 25-26 (La.App. 4 Cir. 3/29/2000), 758 So.2d 923, 939.

In Louisiana, defamatory words have traditionally been classified into two categories: those that are defamatory per se and those that are susceptible of a defamatory meaning. *Lemeshewsky v. Dumaine*, 464 So.2d 973, 975 (La.App. 4 Cir. 1985). Words which

expressly or implicitly accuse another of criminal conduct, or which by their very nature tend to injure one's personal or professional reputation, even without considering extrinsic facts or surrounding circumstances, are considered defamatory per se. *Lemeshewsky*, 464 So.2d at 975. When a plaintiff proves publication of words that are defamatory per se, the elements of falsity and malice (or fault) are presumed, but may be rebutted by the defendant. *Costello v. Hardy*, 2003-1146 (La. 1/21/2004) 864 So.2d 129. The element of injury may also be presumed. *Costello*, p. 13, 864 So.2d at 140. When the words at issue are not defamatory per se, a plaintiff must prove, in addition to defamatory meaning and publication, the elements of falsity, malice (or fault), and injury. *Costello*, p. 14, 864 So.2d at 140.

The plaintiff argues that the defendants' allegations in the RICO action are defamatory per se, and that malice is to be inferred. This Court must first consider whether the words were defamatory per se, permitting an inference of malice. The meaning of "defamatory per se" was set forth in the often quoted case of *Madison v. Bolton*, 234 La. 997, 102 So.2d 433 (1958), wherein the court said:

> Words charged to be libelous have been classified as those that are susceptible of a defamatory meaning and those that are indisputably defamatory on their face. In the latter category they are actionable per se; they impute to the person the commission of a crime or subject him to public ridicule, ignominy or disgrace, and are susceptible of but one meaning. Words not actionable per se fall short of those requirements, and are found in numerous categories, among which are words

> that are actionable only in consequence of extrinsic facts, in which case the surrounding circumstances and conditions must be taken into account to determine the matter, or statements that contain language which unjustifiably tends to injure the reputation of a person, or reflect shame and disgrace upon him. The intent and meaning of an alleged defamatory statement must be gathered not only from the words singled out as libelous, but from the context as well, and the true meaning must be ascertained from a consideration of all parts of the statement as well as the circumstances of its publication. The test is the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate." *Id.*, at 437,438 (footnotes omitted) (citations omitted).

Shylock, Inc. v. Covenant Broadcasting Corp. of Louisiana, 352 So.2d 359, 382 (La.App. 4 Cir. 1977).

Defamatory words are, by definition, words which tend to harm the reputation of another so as to lower the person in the estimation of the community, to deter others from associating or dealing with the person, or otherwise expose a person to contempt or ridicule. *Costello v. Hardy*, 2003-1146, p. 13 (La. 1/21/2004), 864 So.2d 129, 140. Words that convey an element of personal disgrace, dishonesty, or disrepute, are defamatory. *Id.* The question of whether a communication is capable of a particular meaning and whether that meaning is defamatory is ultimately a legal question for the court. *Id.* The question is answered by determining whether a listener could have reasonably understood the communication, taken in context, to have been intended in a defamatory sense. *Id.* In *Mitchell v.*

Truck Service, Inc., 286 So.2d 112, 116 (La.App. 4 Cir. 1973), this Court noted:

> The intent and meaning of an alleged defamatory statement must be gathered not only from the words singled out as libelous, but from the context as well, and the true meaning must be ascertained from a consideration of all parts of the statement as well as the circumstances of its publication. The test is the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of the average person among whom it is intended to circulate.

In the instant case, the plaintiff objects to the defendants' allegations of mail fraud asserted in the RICO complaint and the defendants' reconventional demand. The defendants argue that the allegations in the RICO complaint are protected by privilege and that the allegations in the reconventional demand are affirmative defenses. The federal court dismissed the RICO action in its entirety and ordered defendants to pay attorney's fees. Such action clears Mr. Howard of said violations, and thereby clears his name.

Certain statements are protected by privilege. A person may enjoy a qualified or conditional privilege in making a statement, if it is made (1) in good faith; (2) on a subject in which the person communicating has an interest or owes a duty; and (3) to a person having a corresponding interest or duty. In order to establish the element of good faith, it must be shown that the person making the allegedly defamatory statements had reasonable grounds for believing that the statements were true and that he honestly believed the statements were correct. *Albarado v. Abadie*, 97-478, p. 7 (La.App. 5 Cir. 11/12/97), 703 So.2d 736,741.

While the allegations in the federal complaint were found insufficient to qualify as violations under RICO, they are not necessarily defamatory per se. Prevailing on a claim for defamation requires the plaintiff to prove every element of a claim for defamation. Plaintiff has not proven the elements of falsity and malice, i.e. reckless disregard for the truth. Reckless conduct is not measured by the standard of a reasonably prudent man, rather the proper inquiry is whether "the defendant in fact entertained serious doubts as to the truth of his publication. *Davis v. Borskey*, 92-2339, p.7 (La.App. 1 Cir 8/22/94), 643 So.2d 179, 184. Thus, plaintiff's assertions are insufficient to support a claim for defamation. If one element of defamation is lacking, the claim cannot prevail. *Trentecosta v. Beck*, 96-2388, p. 10 (La. 10/21/97), 703 So.2d 552,559.

Malicious Prosecution

Actions for malicious prosecution have never been favored, and hence, in order to sustain them, a clear case must be established. *Kelly v. West Cash & Carry Bldg. Materials Store*, 99-0102, p. 29 (La. App. 4 Cir. 10/20/99), 745 So.2d 743, 761. The law protects persons who resort to the courts to redress wrongs when they act in good faith upon reasonable grounds in commencing such a proceeding. *Id.*

The Louisiana Supreme Court defined the elements necessary to support a claim for malicious prosecution which requires the plaintiff to prove (1) [t]he commencement or continuance of an original criminal or civil law judicial proceeding; (2) its legal causation by the present defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage conforming to legal standards resulting to

plaintiff. *Robinson v. Goudchaux's*, 307 So.2d 287, 289 (La. 1975); *Darden v. Smith*, 2003-1144, p. 11, (La.App. 3 Cir. 6/30/04), 879 So.2d at 398-99. All elements must be present for him to prevail. *Melius*, 2007-0189, p. 8, 980 So.2d at 173.

The fifth element requires malice. Without malice, Mr. Howard's claim cannot stand. Malice has been defined by the Supreme Court in *Miller v. East Baton Rouge Parish Sheriffs Dept.*, 511 So.2d 446, 453 (La. 1987), as follows:

> Malice is found when the defendant uses the prosecution for the purpose of obtaining any private advantage, for instance, as a means to extort money, to collect a debt, to recover property, to compel performance of a contract, to "tie up the mouths" of witnesses in another action, or as an experiment to discover who might have committed the crime. Malice may be inferred from the lack of probable cause or inferred from a finding that the defendant acted in reckless disregard of the other person's rights.

In civil cases, probable cause is a standard of proof employed in defense of malicious prosecution claims to determine if a party was justified in filing criminal charges or civil lawsuits. *State v. One (1) 1991 Pontiac Trans Sport Van, VIN #1GMCU06D3MT208532*, 98-64 (La. App. 5 Cir. 7/9/98), 716 So.2d 446.

A claim for malicious prosecution is subject to a liberative prescriptive period of one year. La. C.C. art. 3492. The liberative prescriptive period for a malicious prosecution claim does not begin to run until the underlying prosecution is dismissed. *Munay v. Town of Mansura*, 2006-355, p. 7 (La.App. 3 Cir. 9/27/2006), 940 So.2d 832, 838 (citing *Manuel v. Deshotels*, 160

La. 652, 107 So. 478 (1926)). *See Ortiz v. Baniffe*, 523 So.2d 896, 898 (La.App. 4 Cir. 1988). Damage awards in malicious prosecution suits should be compensatory only. *Jones v. Soileau*, 448 So.2d 1268, 1271 (La. 1984).

Thus, plaintiff cannot commence a claim for malicious prosecution on the reconventional demand prior to the reconventional demand being dismissed, and cannot sustain this claim for malicious prosecution of the RICO action because he presented no evidence to prove the element of malice.

Abuse of Process

Abuse of process is a cause of action originating from the common law and recognized in our jurisprudence as a compensable tort under La. C.C. Art. 2315. *Mini-Togs Inc. v. Young*, 354 So.2d 1389 (La.App. 2 Cir. 1978). The two essential elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in regular conduct of the proceeding. *Simon v. Penet*, 619 So.2d 155 (La.App. 3 Cir. 1993). Simply stated, abuse of process mandates that the plaintiff prove that the defendant had an ulterior motive and an irregularity in the process itself. *Alden v. Lorning*, 2004-0724, p. 5 (La.App. 4 Cir. 5/4/2005), 904 So.2d 24, 28. When the irregular use of process is found, an ulterior motive is presumed. *Id.* Using the legal process for an improper reason is the crux of finding an abuse of process. *Id. Melius*, 2007-0189, p. 7, 980 So.2d at 173.

Under this cause of action, plaintiffs must allege irregularity in the process itself. *Mini-Togs, Inc.*, 354 So.2d at 1391. "Regular use of process cannot constitute abuse, even though the user was actuated by a wrongful motive, purpose, or intent, or by malice." *Mini-Togs, Inc.*, 354 So.2d at 1390. Absent a showing of abuse through an illegal, improper or irregular use of process,

a plaintiff will have failed to state a cause of action. *Waguespack, Seago and Carmichael (A PLC) v. Lincoln*, 99-2016 (La. App. 1 Cir. 9/22/2000), 768 So.2d 287.

In order to prevail on the claim of abuse of process, plaintiff must show that defendants misused a process already legally issued and intended to use that process to obtain a result not proper under the law. *Goldstein v. Serio*, 496 So.2d 412 (La.App. 4 Cir. 1986). Plaintiff has not shown an irregularity in the proceeding. As a result, plaintiff has failed to allege a cause of action for abuse of process.

Conspiracy

Louisiana recognizes no tort of conspiracy, per se. Rather, the actionable element in La. C.C. art. 2324—providing that "[h]e who conspires with another person to commit an intentional or willful act is answerable in solido, with that person, for the damage caused by such act,"—is the underlying tort. *Ross v. Conoco, Inc.*, 2002-0299, pp. 7-8 (La. 10/15/2002), 828 So.2d 546, 552; see also *Thomas v. North 40 Land Development, Inc.*, 2004-0610, p. 23 (La.App. 4 Cir. 1126/2005), 894 So.2d 1160, 1174. The actionable element of a conspiracy claim is not the conspiracy itself; rather, it is the tort that the conspirators agree to perpetrate and actually commit in whole or in part. Conspirators can tacitly agree to enter into a conspiracy to cause injury or damage for purposes of La. C.C. art. 2324. *Miller v. Keating*, 339 So.2d 40, 43 (La.App. 3 Cir. 1976).

To succeed on a conspiracy claim, a plaintiff must prove an unlawful act and assistance or encouragement that amounts to a conspiracy, and such assistance or encouragement must be of such quality and character that a jury could infer from it an underlying agreement and act that is the essence of the conspiracy. *Thomas*, 2004-0610, p. 22, 894 So.2d 1160, 1174.

The plaintiff has brought a claim of conspiracy against the father of defendant St. Germain for allegedly conspiring to injure plaintiff by helping his daughter pay legal fees and expenses. Such behavior is not conspiracy. The plaintiff has not demonstrated that David E. Simmons committed an unlawful act, or that he conspired with the co-defendants to commit an unlawful act. Therefore, the district court erred in not dismissing the plaintiff's claim for conspiracy.

II. MOTION TO DISQUALIFY ATTORNEY

The third issue presented for review is the order granting the plaintiff's motion to disqualify attorney Mark Andrews from representing all co-defendants, including his own solo practice law firm, based upon a possible conflict of interest.

In assessing whether a conflict of interest exists, a court must be convinced that the conflict is actual, not merely hypothetical or speculative. *State v. Lobato*, 621 So.2d 103 (La.App. 2 Cir. 1993). An actual conflict of interest is established when the defendant proves, through specific instances in the record, that his attorney was placed in a situation inherently conducive to divided loyalties. *State v. Tart*, 93-0772 (La. 2002/09/96), 672 So.2d 116, cert. denied, 519 U.S. 934, 117 S.Ct. 310, 136 L.Ed.2d 227 (1996). The mere possibility of divided loyalties is insufficient proof of actual conflict. *Lobato*, 621 So.2d 103 (La.App. 2 Cir. 1993).

Attorney/defendant Mark Andrews argues that the district court improperly disqualified him from representing his own solo-practice law firm, also made a co-defendant, as plaintiff did not offer a motion to the court to do so. Mr. Andrews is correct. The district court erred when it disqualified Mr. Andrews from representing his own solo-practice law firm because it creates no conflict. Such representation would be the

same because his duty to himself is no different from his duty to his solo-practice.

The plaintiff argues that Mark Andrews was properly disqualified as attorney for the defendants under the La. Rules of Professional Conduct, Rule 1.7 because his own representation is adverse to the representation of his clients. The plaintiff asserts that Mark Andrews either acted alone or in concert with his clients in making the allegations against the plaintiff. The plaintiff also alleges that Mark Andrews may have possibly been in an intimate relationship with one of the co-defendants. Plaintiff argues that a conflict also exists under Rule 3.7, because Mr. Andrews will be both a witness and a party in this case.

The defendants filed a peremptory exception and argued that the plaintiff has no standing to assert a conflict of interest or potential conflict among codefendants and their attorney, Mark Andrews. The defendants point out that although their attorney is also co-defendant, none of the co-defendants have asserted a conflict of interest. The co-defendants maintain that Mark Andrews is prevented from testifying against the co-defendants' interests by a continuing duty of confidentiality and loyalty. They assert that the attorney-testimony rule only operates to restrict an attorney from being an advocate at trial, and does not operate to disqualify an attorney.

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. *Farrington v. Law Firm of Sessions, Fishman*, 95-0851, p. 5 (La.App. 4 Cir. 5/8/96), 674 So.2d 448, 450. The plaintiff has not alleged that he would be prejudiced in

any way by Mark Andrews' representation of the other defendants.

The jurisprudence has typically viewed conflict claims as a species of ineffectiveness claims. *State v. Holder*, 99-1747 (La.App. 3 Cir. 10/11/2000), 771 So.2d 780. Joint representation of conflicting interests is suspect because of what it tends to prevent counsel attorney from doing. *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173 (1978). One circumstance which has been recognized by the Louisiana Supreme Court as sufficient to establish an actual conflict of interest is the situation wherein there is proof that the attorney was placed in a situation "inherently conducive to divided loyalties," *State v. Carmouche*, 508 So.2d 792 (La. 1987); *State v. Kahey*, 436 So.2d 475,484 (La. 1983). An actual conflict of interest exists if a defense attorney owes duties to a party whose interests are adverse to those of the defendant. The interest of the other client and the defendant is sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. *State v. Morris*, 2000-1296, p. 22 (La.App. 3 Cir. 8/29/2001), 802 So.2d 43, 68.

With regard to Mr. Andrews' representation of the remaining co-defendants, he has represented them for well over a year without any complaint from the co-defendants. Considering the contentious nature of these proceedings it appears that this motion is being used as another obstructive tactic devised by the plaintiff. In *Brasseaux v. Girouard*, 214 So.2d 401 (La.App. 3 Cir. 1968), the court noted that disqualification could be used as an obstructive tactic and, therefore, the right to urge disqualification of an opposing counsel may be waived by the failure to raise the issue early in the proceedings. *Corbello v. Iowa Production Co.*, 2000-1403, p. 3 (La.App. 3 Cir. 6/6/2001), 787 So.2d 596, 599.

Thus, we find that the district court erred in disqualifying Mark Andrews from representing the defendants and his solo law firm in this matter.

IV. EX PARTE ORDER FOR SECURITY COSTS

The final issue presented for review pertains to the issuance of an ex parte order for defendants to pay security costs of $6,500, which defendants argue is improper because only plaintiffs can be ordered to pay security costs, and never the defendants.

Defendants are correct. This order is clearly contrary to Louisiana law as La. R. S. 13: 1215 requires the plaintiff or party prosecuting the cause to give bond or other security, not the defendant. In addition, this Court has held that the defendant can not be required to post bond for costs, either in the capacity of defendant or in the capacity of plaintiff in reconvention. *Herzog's Automotive Parts, Inc. v. Baronne Auto Supply, Inc.*, 94-1054, p. 1 (La.App. 4 Cir. 6/30/94), 639 So.2d 1223, 1224; *Wabnig v. Royal Crystal Art Co., Inc.*, 301 So.2d 366 (La.App. 4 Cir. 1974). In *Wabnig*, this Court stated that the fact that the defendant is a plaintiff in reconvention cannot serve as a basis for requiring the defendant to post bond, and held that a separate suit filed by the defendant that was consolidated with the original proceeding did not provide a basis for requiring the defendant to post bond in the original case. *Wabnig*, 301 So.2d at 367.

The plaintiff first argues that this issue is untimely, unauthorized, and improperly filed because the thirty day delay has expired since the order was issued on August 25, 2009, and the defendants did not request a return date, and then argues that the issue is moot because the district court dismissed all claims filed by the defendants. The record is replete with motions

and oppositions filed by both parties, so it is unclear whether the issue of the ex parte order for costs was intended to be dismissed or forgotten. The defendants timely filed a counter motion to strike the ex parte order for the defendants to pay security costs on August 28, 2009, which was apparently overlooked for argument at the hearing on September 4, 2009. Thus, it cannot be considered for review herein.

DECREE

Hence, this writ application is granted and we order that the corresponding district court judgments are reversed with respect to:

1. The judgment granting plaintiffs exception of res judicata;

2. The judgment denying defendants' special motions to strike;

3. The judgment disqualifying Mark Andrews from representing the defendants and his solo law practice;

4. The exception of prescription as it relates to:

a) The co-defendants' claims for breach of contract; and

b) Lesley Simmons St. Germain's claim for legal malpractice.

All other claims raised in this writ application are denied.

New Orleans, Louisiana this 26th day of January 2010.

s/ JUDGE CHARLES R. JONES

s/ JUDGE DENNIS R. BAGNERIS, SR.

s/ JUDGE EDWIN A. LOMBARD

APPENDIX F, RELEVANT STATUTES

28 USC §1367. Supplemental jurisdiction

[...]

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

[...]

28 USC §1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. [...]

28 USC §1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

[...]

28 USC §1447. Procedure after removal generally

[...]

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446 (a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

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(2)

No. 10-58

Supreme Court, U.S.
FILED
OCT 15 2010
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In The

Supreme Court of the United States

MARK EDW. ANDREWS,

Petitioner,

v.

D. DOUGLAS HOWARD, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Can petitioner avoid fee shifting on remand under 28 U.S.C. § 1447(c), by declaring that an issue which the U.S. Supreme Court has addressed constitutes the "absence of clearly established law, demonstrating a lack of reasonable basis or clearly established law"?

2. Can petitioner claim that a lodestar analysis of fee shifting has been bypassed when both the district court and appellate court were briefed on the issue, and the lodestar analysis was applied?

3. Can petitioner re-litigate the validity of the Order of Remand through continual appeals and a request for rehearing on the issue of the attorney's fees and costs awarded against him by the Fifth Circuit Court of Appeals?

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STATEMENT OF THE CASE

BACKGROUND

This case first began in First City Court for the City of New Orleans. Respondent, D. Douglas Howard, Jr. ("Howard") had filed a suit on an open account against a former divorce client defendant, Leslie Simmons St. Germain ("St. Germain"), seeking recovery for payment of unpaid fees. Howard won and collected the fees due. Petitioner, Mark Andrews ("Andrews"), then sued respondent Howard on behalf of St. Germain in the Civil District Court for the Parish of Orleans, alleging, *inter alia,* that Howard had committed legal malpractice and breach of contract. Petitioner requested that Howard join in a voluntary Motion to Dismiss the legal malpractice claims without prejudice which respondent Howard did, believing that the matter had been put to rest.

Respondent Howard was wrong. Petitioner then filed on behalf of his client, St. Germain, and two former clients of respondent, a RICO action in the Federal Eastern District of Louisiana, alleging that respondent had committed various RICO violations, including mail fraud and wire fraud. Additionally, petitioner, on behalf of his clients, reurged all the claims that St. Germain had voluntarily dismissed in the State Civil District Court. Finding that the defendants RICO allegations were meritless, the Federal Eastern District Court dismissed the case. Respondent appealed the dismissal to the United Court of Appeals for the Fifth Circuit, but it affirmed

the dismissal and judgment was entered accordingly. Petitioner filed writs to this Court, which were denied.

Respondent Howard filed a Petition for Defamation in state district court partly on grounds of lodging of the above RICO action which falsely alleged that he had committed wire and mail fraud. Petitioner, on behalf of his clients, removed the defamation action to the Eastern District of Louisiana even though he had no valid grounds to remove the state claims. However, the Eastern District Court remanded the matter and awarded attorney's fees for a frivolous removal. Petitioner appealed the award of attorney's fees to the Fifth Circuit Court of Appeals, which affirmed the award, and awarded double costs and attorney's fees for the frivolous appeal of the attorney's fees award. Petitioner sought an *en banc* rehearing, which was denied. Petitioner now seeks review of the award of attorney's fees and costs with this Court.

I. RELEVANT FACTS

Petitioner represented former clients of Howard, an attorney known within the local community as a premiere divorce attorney who aggressively protects the interest of those clients. Howard represented Hillary Hillyer ("Hillyer")[1] in 2005-2006, Leslie St.

[1] Both Hillyer and Luminais have withdrawn from all actions against Howard.

Germain ("St. Germain") in 2006 and Melissa Luminais ("Luminais") in 2007.

II. PROCEDURAL HISTORY

Petitioners had alleged that Howard is a racketeer who engaged in mail fraud and wire fraud because he required a retainer, charged an administrative fee, and withdrew his representation from two of the petitioners as per the terms of their contracts. The fees paid by each of the petitioners to Howard were $6,500, $7,653 and $12,657.

Frustrated by the non-stop litigation being instigated by Andrews, who had posted his Supreme Court brief – the brief that called Howard a racketeer – on his website, respondent Howard sued the defendants in state court for defamation based upon the contents of the federal pleadings. Petitioner Andrews responded by filing a reconventional demand alleging malpractice and breach of contract – the state law claims that had been dismissed by the Eastern District Court without prejudice almost a year before. Based upon the allegations in the reconventional demand, Howard amended his Petition to add claims of abuse of process and malicious prosecution.

Petitioner removed the state court proceedings to the Eastern District of Louisiana where Howard filed a Motion to Remand.

At that hearing, Andrews was unable to state any legitimate grounds for the removal. The district

court chastised him for the baseless removal, remanded it to state court, and assessed attorney's fees against Andrews. Andrews opposed the imposition of fees arguing that he could not afford them. The court then issued an order that all defendants are liable for the attorney's fees.

The Fifth Circuit affirmed the award of costs and attorney's fees by the district court, and additionally sanctioned Andrews with the fees and double costs Howard incurred in opposing the appeal. The Fifth Circuit rejected petitioner's contention that the removal was supported by reasonable grounds based on his argument that because he is an officer of the Court and/or that his case raises a constitutional question. The Fifth Circuit relied on this Court's holding in *Cammer v. United States*, 350 U.S. 399, 405-08 (1956), which determined that an attorney is not an officer of the Court within the ordinary meaning of that term, as well as *Ex Parte Garland*, 71 U.S. 333, 378 (1866). The Fifth Circuit also relied on *Willingham v. Morgan*, 395 U.S. 402, 406-08 (1969), which interprets 28 U.S.C. § 1442 as applying to only those cases where a federal officer required a federal forum, and was never intended to be used by a private attorney to remove a state action to federal court. Petitioner filed a request for *en banc* hearing, which was denied.

Petitioner seeks this writ of certiorari to overturn the Fifth Circuit's award of attorney's fees and double costs as a result of the frivolous appeal. However, in seeking the overturn of the award, he attacks the

rationale of the district court's decision to remand and the Fifth Circuit's affirmation of that remand.[2]

REASONS FOR DENYING THE PETITION

- Controlling case law existed at the time of the removal, which established that a private attorney could not remove a case under 28 U.S.C. § 1442;
- There is no constitutional question raised by the petitioner's prior state claims, nor did prior RICO legislation raise a federal question;
- The district court did not abuse its discretion in taxing of costs and awarding attorney's fees when no objectively reasonable basis for removal existed. The Fifth Circuit Court of Appeals correctly sanctioned Andrews for a frivolous appeal of the district court's award;
- The lodestar standard was applied in awarding attorney's fees; and
- Petitioner's continued appeals are an attempt to circumvent the purpose of 28 U.S.C. § 1442.

[2] Petitioner has not sought certiorari on behalf of his clients, but only on his own behalf. If this Court were to grant the writ, petitioner's clients would still be responsible for the costs and attorney's fees since they are not parties to the writ.

1. Existing case law established that removal was not possible as an officer of the court or through the need for a federal defender.

To qualify for removal under 28 U.S.C. § 1442(a)(3), the defendant must show both that the suit is based on actions taken under the color of office **and** that the officer of the federal court has a colorable federal defense. *Jefferson County, Ala. v. Acker*, 527 U.S. 423, 199 S.Ct. 2069 (1999). The district court, having found that Andrews was not an officer of the court for purposes of removal, could have stopped its inquiry there.

Instead, the federal district court asked Andrews to identify defendants' purported colorable federal defenses, which could include official immunity, sovereign immunity, governmental tax immunity doctrine, the government contractor defense, acting within the course and scope of federal duties, and/or that state law claims could impede enforcement of a federal law. Andrews asserted the "federal contractors defense," *i.e.*, that he was under federal direction when he filed his original brief. This new approach prompted the following dialogue between Andrews and the federal district court:

> The Court: So I was directing you to do what you did in this Court, to file what you filed? Are you saying I was the federal officer who was directing you to do what you did?

Mr. Andrews: You didn't direct me to file the case, Your Honor.

The Court: Well, name the federal officer who was directing you.

Mr. Andrews: The entire court was.

This interchange underscores the absurdity of the argument and supports the district court's award of attorney's fees as well as the sanctions awarded by the Fifth Circuit. (Transcript, pg. 16, App. 16).

2. Petitioner's clients stated no federal question.

Petitioner also averred that the petition was removable under 28 U.S.C. § 1441(b), which allows a defendant to remove a claim over which the federal court has original jurisdiction arising under the Constitution, treaties or laws of the United States. The test for original jurisdiction is whether the federal court would have had jurisdiction over the claims filed in the Petition being removed if it had been filed in federal court. The Petition and the Amending Petition asserted state law claims of defamation, abuse of process, malicious persecution, and intentional and negligent infliction of emotional distress. Petitioner's two former and present clients asserted state law claims of malpractice and breach of contract, in their reconventional demand. None of these claims raise a federal question.

Nonetheless, petitioner argued that a federal question was created because respondent Howard's Exception of Prescription, filed in state court, argued that defendants' reconventional claims were time barred, where those claims had originally been dismissed without prejudice by the federal district court. Again, petitioner was unable to cite any statutory or jurisprudential law to support his argument.

Petitioner unsuccessfully argued that there was "at least an informal recognition that the new removed action had some kind of relation to the former federal case, and that petitioner was not unreasonable in thinking that such a relationship existed" because the district court mentioned the prior RICO suit. Petitioner failed to mention that the discussion was in the context of the district court chastising him for filing a motion to remove that was as baseless as the RICO case which had been dismissed:

> And it's already been decided, in this Court and the Fifth Circuit, that the underlying RICO case was legally untenable.

(Transcript, pg. 22, App. 22).

The federal district court's observation that both the suit and motion were baseless hardly creates a federal question or any other grounds for removal. The federal district court held that "there are no federal causes of action or claims pled in the state court lawsuit to make it removable under the federal question jurisdiction."

Clearly the district court wanted to send a message to Andrews when it awarded attorney's fees and costs. In the hearing, the district court noted:

> It is true that both this Court and the Fifth Circuit denied the defendant's, Mr. Howard, in that case, the defendant's motion for sanctions. I don't recall exactly what was said about that at the time, frankly, but I think I made a ruling for the bench, as I recall. But I'm not a big fan of sanctioning lawyers, and I'm assuming I just gave Mr. Andrews the benefit of the doubt by not sanctioning him; although it was certainly plausible that he could have been sanctioned, I think, for filing the RICO suit, which was totally baseless, as far as I am concerned.
>
> The Fifth Circuit, as I recall, also, in denying the sanctions, made the comment that it was a very close call, which means they could have gone either way.
>
> Mr. Andrews, before you file anymore, you now, you filed a RICO claim in this Court, that was totally baseless; now you've filed a removal, which was totally baseless. I am imposing fees and costs this time. This has got to stop. And I strongly suggest you do a lot more research before you start filing things in federal court again.

(Transcript pg. 25, App. 25). Thus, under the facts and in light of defendants' failure to legally support the removal, the award was appropriate.

The Fifth Circuit Court of Appeals affirmed the District Court as follows:

> We recently considered a similar request by Appellee in litigation involving these parties in *St. Germain v. Howard*, 556 F.3d 261, 264 (5th Cir. 2009) ("*Howard I*"). In *Howard I*, we dismissed the Appellant's appeal concerning their RICO suit brought against Appellee and two law firms with which he is affiliated without imposing sanctions. *See id.* at 264. However, we noted that it was a "close case" on our decision to deny sanction because the Appellants did not clearly present a cognizable civil RICO claim. *Id.* Here, we impose sanctions of double costs and attorney's fees against Appellant. Supreme Court cases exclude a private attorney from the meaning of "officer of the court," and the district court found Appellant's "officer of the court" argument to be a ridiculous, "farfetched notion." Appellants were on notice that the overruling of objections to remand was an obvious result when they were unable to support their argument at the district court. This appeal is frivolous for purposes of Rule 38.
>
> For the foregoing reasons, we AFFIRM the judgment of the district court and GRANT the motion for sanctions and double costs and attorney's fees.

The Fifth Circuit's opinion confirmed that a constitutional question was not raised by petitioner's

state claims and that petitioner's prior RICO legislation did not raise a federal question. Petitioner's burden of the additional $5,867.00 imposed by the Fifth Circuit pales when compared to the defense costs of over $130,000 that petitioner imposed upon respondent with his never-ending baseless pleadings filed in city court, civil district court, state appellate court, federal district court, federal appellate court, the U.S. Supreme Court, and the state disciplinary counsel. The writ of certiorari applied for should be denied so that the sanctions awarded by the Fifth Circuit Court of Appeals are upheld.

3. Award of fees supported – petitioner's contentions that the lodestar analyses for fee shifting was bypassed is patently untrue.

Petitioner poses the question, "May lodestar analysis of fees shifting be bypassed?" it was not. Federal law allows that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). In the Fifth Circuit, the "lodestar" method is used to calculate reasonable attorney's fees. *Matter of Fender,* 12 F.3d 480, 487 (5th Cir. 1994), *cert. denied sub nom.*, 511 U.S. 1143, 114 S.Ct. 2165, 128 L. Ed. 2d 888 (1994). Under the "lodestar" analysis, the determination of reasonable attorney's fees involves a two-step procedure. *Louisiana Power & Light Company v. Kellstrom,* 50 F.3d 319, 324 (5th Cir. 1995), *cert. denied*

sub nom., 516 U.S. 862, 116 S.Ct. 173 (1995), citing *Hensley v. Eckerthart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 1939 (1983). Initially, the district court must determine the reasonable number of hours expended on the litigation and the reasonable hourly rates for the participating lawyers. *Id.* Then, the district court must multiply the reasonable hours by the reasonable hourly rates. *Id.* The product of this multiplication is the lodestar, which the district court then either accepts or adjusts upward or downward, depending on the circumstances of the case, assessing the dozen factors set forth in *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 1122 (5th Cir. 1969).

In *Johnson*, the Fifth Circuit identified twelve factors to be considered in determining an award of reasonable fees, which are applied "whenever the award of reasonable attorney's fees is authorized by statute." Here, the district court applied these factors when awarding the attorney's fees. Petitioner did not even object to the hourly rate awarded Ms. Rinardo, but nitpicked at such things as whether 3.8 hours for researching petitioner's arguments was too much.

The district court's order makes it clear that the lodestar method was applied when it awarded $7,088.00. The Fifth Circuit affirmed that award and sanctioned Andrews and his clients for a frivolous appeal. (App. 28).

When Howard filed a Motion and Memorandum for Attorney's Fees in the Fifth Circuit, the court applied the lodestar method with detailed discussions of the number of hours expended on the litigation

and the reasonable hours for the participating attorneys, as well as the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-718 (5th Cir. 1974). Andrews claim that the lodestar was bypassed has no merit and is factually incorrect.

4. Petitioner is attempting an end around appeal of the district court's remand order.

Although Petitioner has not styled this action as an appeal of the district court's remand order and the Fifth Circuit's affirmation thereof and sanctions, it is respectfully suggested that he is, nonetheless, attempting to put the appropriateness of the remand order at issue before this Honorable Court. While the United States Court of Appeals for the Fifth Circuit correctly noted in its opinion of March 5, 2010, that appellants had not sought review of the remand decision, it appears that Petitioner is now contesting the district court's remand order through this writ of certiorari.

The remand order is non-appealable under 28 U.S.C. § 1447, which provides, in pertinent part that:

> **(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443**

> **of this title shall be reviewable by appeal or otherwise.**

The bar against appeal of a remand order applies to remand orders made on grounds authorized in 28 U.S.C. § 1447(c), *i.e.*, lack of subject matter jurisdiction and a defect in the removal process. *Powerex Corp. v. Reliant Energy Services, Inc.*, ___ U.S. ___, 127 S.Ct. 2411, 2415, 168 L. Ed. 2d 112 (2007).

Referring to the 28 U.S.C. § 1447(d) bar to the review of remand orders, this Court has noted that: "the policy of Congress opposes 'interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.'"

Kircher v. Putnam Funds Trust, 547 U.S. 633, 126 S.Ct. 2145, 2152, 165 L. Ed. 2d 92 (2006), citing *United States v. Rice,* 327 U.S. 742, 66 S.Ct. 835, 90 L. Ed. 982 (1946). In *Rice*, the Supreme Court ruled that:

> **Congress, by the adoption of these provisions, as thus construed, established the policy of not permitting interrupting of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed. This was accomplished by denying any form of review of an order of remand, and, before final judgment, of an order denying remand.**

327 U.S. at 751.

Petitioner's application for a writ of certiorari attempts just what the statute forbids – "the interruption of litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction." For this reason, the sanctions award should be upheld, and the writ of certiorari should be denied.

CONCLUSION

The district court not only remanded this matter to state court, but exercised its discretion and awarded Howard all attorney's fees incurred in remanding the suit. The award was affirmed by the Fifth Circuit Court of Appeals, which then awarded attorney's fees and double costs for a frivolous appeal. The award was appropriate because petitioner was unable to cite any legal support for the removal. Instead, petitioner proferred theories for removal that were deemed "farfetched" and a "crazy notion" by the lower court. The sanctions incurred are well-documented and reasonable. The requested writ of certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

* *

D. DOUGLAS HOWARD, JR.

V.

LESLEY SIMMONS ST. GERMAIN, HILLARY ROSE SMITH, MELISSA BRANIGHAN, MARK EDW. ANDREWS, ANDREWS ARTS & SCIENCES LAW, LLC, & DAVID E. SIMMONS, DDS

CIVIL DOCKET NO. 09-3450 "J"
NEW ORLEANS, LOUISIANA
WEDNESDAY, JUNE 24, 2009, 9:30 A.M.

* *

TRANSCRIPT OF PROCEEDINGS
HEARD BEFORE
THE HONORABLE CARL J. BARBIER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY. TRANSCRIPT PRODUCED BY COMPUTER.

[3] **PROCEEDINGS**

WEDNESDAY, JUNE 24, 2009

MORNING SESSION

(COURT CALLED TO ORDER)

THE DEPUTY CLERK: Civil Action #09-3450, *D. Douglas Howard, Jr. versus Leslie Simmons St. Germain, et al.*

THE COURT: Maybe if counsel for the government could just move down a little bit and make a little room for these folks to sit around these tables. Thank you.

All right. Counsel, you can make your appearances, please.

MS. REED: Good morning, Your Honor. Shawn Reed on behalf of D. Douglas Howard, Jr.

MR. HOWARD: D. Douglas Howard, Jr., in *pro se*.

MS. RINARDO: Joanne Rinardo.

MS. YENARI: Amy Yenari.

MR. PETERS: Jonathan Peters.

MR. ANDREWS: Mark Andrews, *pro se* and on behalf of the rest of the defendants.

THE COURT: Who is going to argue on behalf of the movers?

MS. REED: Shawn Reed, Your Honor, myself.

THE COURT: Ms. Reed, okay. Come forward. This is your [4] motion. The only motion that we're hearing this morning is the Plaintiff's, Douglas Howard's, Motion to Remand this matter to state court. I believe I've read everything that you all have filed, and read the cases, or the main cases.

Ms. Reed, you can proceed.

MS. REED: Your Honor, I know that excuse me, good morning. My name is Shawn Reed, and I have the pleasure this morning of representing D. Douglas Howard in this matter.

Judge, I know that you're somewhat familiar with this case. I think you've seen it in the past, and so here we are, again.

Frankly, Judge, this is a case that involves purely state court causes of action. In the *Trevino* case, as this Court is aware, the Supreme Court said that you can avoid federal court by the plaintiff only using – relying on state court causes of action.

Well, as you know, this saga began in First City Court for the collection of a debt. It has escalated to this point now, and it's an ongoing attack on the personal and professional reputation and integrity of Mr. Howard. One would think that this would have ended at some point, but –

THE COURT: What's the status of the underlying – let's see. This started as a suit to collect legal fees –

MS. REED: Open account.

THE COURT: – by Mr. Howard against Ms. St. Germain and [5] somebody else –

MS. REED: That's correct. That's correct.

THE COURT: – for some legal work he did in connection with a divorce, right?

MS. REED: That's correct.

THE COURT: What were the amount of the legal fees involved?

MS. REED: About $4,000.

THE COURT: $4,000. And now we've had two federal lawsuits, two state court suits, RICO suits, defamation suits, appeals to the Fifth Circuit, writs to the U.S. Supreme Court –

MS. REED: Yep.

THE COURT: – over a suit for attorney's fees over three or $4,000.

MS. REED: And I would tell you, Judge, that –

THE COURT: I'll tell both sides here, this is absurd. Both of you, both sides need to grow up here and make this go away. I mean, this is absolutely ridiculous. Okay.

You can proceed from there.

MS. REED: Judge, and I want to – I want to make this clear that I think it was Mr. Howard's intention to make –

THE COURT: Mr. Howard has now collected his fees, right?

MR. HOWARD: Yes.

MS. REED: Yes. But we have paid over $100,000 in fees [6] to defend the suits brought by Mr. Andrews. In addition to that, Your Honor, Mr. Andrews doesn't stop. He's now posted this information on his web site about Mr. Howard. He's

written the bar association on numerous occasions, which cases have been dismissed.

If Mr. Andrews would stop the continuous on-going attacks, then perhaps we could end this matter; but, it's impossible to do that.

So, with that said, Your Honor, the reason I got involved in this case, and I'll tell you, is because I felt like maybe I could interject some levity and calm between the parties. And the very first thing I do is get a motion for sanctions filed against me. I've never met this man before in my life before this morning, and I still haven't formally met him. So I agree with you that this is a very difficult case. But I will tell you –

THE COURT: I didn't say it was a very difficult case.

MS. REED: Well, it's absurd.

THE COURT: You said. I said it's absurd, is what I said. Yes.

MS. REED: But it's on ongoing character assassination that hasn't stopped. If you go to his web site today, you'll find all of this information, that Mr. Howard has basically stolen from clients, his malpractice, his – on and on and on and on.

[7] So, with that said, in an effort to try to stop this, the plaintiffs filed a suit on state court causes of action solely, Your Honor. And these state court

causes of action are defamation, malicious prosecution, abuse of process, intentional and negligent infliction of emotional distress. There were absolutely no federal claims whatsoever urged in this case.

There is no federal question. I think this Court previously dismissed the RICO actions; and, so, from that, the defense now wants to argue that that –

THE COURT: Which was affirmed by the Fifth Circuit, right?

MS. REED: Which was absolutely affirmed by the Fifth Circuit.

THE COURT: Now, Mr. Andrews says he's got a pending writ application to the U.S. Supreme Court?

MS. REED: Yes, sir, but that's really irrelevant to this case, and I'll tell you why. It's because in this very lawsuit, Mr. Andrews filed a reconventional demand, where he realleged all of the same things. So, regardless of what happens with the RICO suit, Mr. Howard still has the same exact state court claims because it didn't just end or begin with the RICO. It's an ongoing. It's everywhere. It's the bar association. It's in the community. It's on his web site.

So, really, what happens with the U.S. writ is not going to change what's ongoing in state court for defamation and [8] malicious prosecution and his ongoing intentional infliction of emotional distress.

Judge, this is a case that, although RICO claims were made, those are just a small minutia of the facts that make up this state court claim. And to say that this Court's dismissal of the RICO action, and the Fifth Circuit approving that, somehow turns a defamation suit into a federal question is also ludicrous, Your Honor. There is no – the very fact that this Court dismissed the RICO case, the Fifth Circuit approved the dismissal, if anything, supports the fact that there is no federal jurisdiction or federal question in this case.

No new – in the original petition, all of the same set of facts were contained in the original petition that was filed in Civil District Court. The supplemental and amending petition filed by Mr. Howard really just recited more specifically the various causes of action. So our first argument is, his whole removal was untimely because –

THE COURT: What defenses, other than trying to remove – removing this case here, removing Mr. Howard's defamation and malicious prosecution, et cetera, state court suit, what defenses, affirmative defenses, has Mr. Andrews or his clients asserted here in this case?

MS. REED: Well, I think that that's a very important question because, under his argument that he is an officer of the court, not only would he have to be an officer of the court, [9] which we say he's not and we'll get into that, the second part of that test by the Supreme Court is that he would have to have a

federal defense in order to maintain jurisdiction under 22 1442 – 28 U.S.C. 1442. The only defenses that he's alleged in this case, *res judicata*, prematurity, and prescription.

THE COURT: *Res judicata* based on –

MS. REED: On the fact that –

THE COURT: – the fact that I did not sanction him, and the Fifth Circuit did not sanction him?

MS. REED: Yes.

THE COURT: Okay.

MS. REED: And so, therefore – but, Your Honor, all of those claims are still state court, state court claims. The prescription would apply state court law of prescription and tolling or peremption. *Res judicata* would also apply in state court, what the state court *res judicata* laws would be. Prematurity are state court prematurity. And this Court would really just be applying state court defenses to a state court claim.

Under 1441 – let's look – that's another thing that he argues. Well, would it have been proper to file this suit in federal court to begin with? And the answer is absolutely not. There is no diversity between the parties. There is no federal claim here. The amount in controversy is over $75,000. The legal fees alone are over $100,000, and that's [10] an actual

damage. So there is no way that this suit could have been filed as original jurisdiction in federal court.

Then, Mr. Andrews attempts to say that, well, he's an officer of the court; and, now, in his reply brief, he says, well, that's novel law. That's not novel law. There is plenty of law to the effect that just because we're licensed to practice before a federal court doesn't make us a federal officer of the law or officer of the court.

There's several cases that we cited, one very similar to this where Mr. Berg successfully defended himself in federal court under a malicious – it was a racketeering case, then filed a malicious prosecution action. The defense tried to remove it to federal court by saying, well, that case arose in federal court, it was about a racketeering charge; and, so, therefore, the malicious prosecution involves a federal question.

The Ninth Circuit sent it back and said, absolutely not. That's a state court issue. It needs to go back to state court. Just by the very fact that you would have to look at some federal issues involved does not change it into a federal question case that would be removable.

Same in the *Cammer* case. A defendant was held by its local bar association – he was in private practice, he was also held on disciplinary charges – that was the *Shimek* case. He came up on disciplinary –

THE COURT: *Cammer* was the case where the lawyer –

[11] MS. REED: In contempt.

THE COURT: – in federal court was held in contempt –

MS. REED: Right.

THE COURT: – under a statute which allows a federal judge to find in contempt an officer of the United States for violation of their official duties.

MS. REED: You're exactly right.

THE COURT: Yes.

MS. REED: And in *Shimek*, this attorney that had – because of what he did in federal court, the state filed disciplinary action against him. He sought to remove his disciplinary proceeding to federal court saying, well, this started in federal court. And they said, no. They sent it back.

The U.S. Supreme Court – citing the U.S. Supreme Court case of *Willingham* that says just because a lawyer is – can practice before the court doesn't make them an officer of the court. An officer of the court – even if – well, let's – even if we assume that he wins on his issue that he is an officer of the court – which clearly he's not under any case that he's cited. In fact, I don't think he ever cited a case that made him an officer of the court. Even if that was the case, the test under 1442 is not only are you an officer of the court, you also have to have a federal defense available to you under 1442.

This is clearly to prevent a state from applying – [12] going off and applying some weird law to a federal officer that, in federal court, would be given immunity of some sort, or they were actually working for the government.

Not only does he not have a defense, and he's not an officer of the court, I can't find anywhere in his pleadings where he's ever even alleged that he has a federal defense in this case. So, therefore, he certainly hasn't met the test under 1442 for federal jurisdiction.

And under 1441, there is nothing that's been done and nothing that could happen in the future, with the U.S. Supreme Court or any other court, that would change this issue into a federal question.

THE COURT: All right. I understand your argument. Let me hear from Mr. Andrews. Thank you.

MS. REED: Thank you, Your Honor.

THE COURT: Mr. Andrews –

MR. ANDREWS: Yes, Your Honor.

THE COURT: – you removed this case, what is ostensibly, on its face, a pure state law claim based on state laws of defamation, malicious prosecution and abuse of process, you removed it to federal court on two grounds, as I see it, right?

MR. ANDREWS: Yes, Your Honor.

THE COURT: One, on behalf of all defendants, that there is a federal question, so it arises under federal law. And, [13] secondly, that as it pertains to you as a named defendant, that you being, quote, an officer of the court, you have a right to remove it under the so-called federal officer removal provision.

MR. ANDREWS: Yes, Your Honor.

THE COURT: Let's talk about the federal officer removal statute first. Do you have a single case which holds or implies in any way that a private lawyer in private practice who practices in federal court is an officer of the United States courts for the purposes of this removal statute or any other statute?

MR. ANDREWS: I do not have a case that holds so. What I have is the *Herron* case from 1994 or '96, in the Fifth Circuit, where, in footnote two, they say, "We do not reach this question."

THE COURT: They say, "We do not reach this question." That's a far cry from holding or even implying that that's the law, right?

MR. ANDREWS: Yes, Your Honor. But I have the First Circuit –

THE COURT: So I'm asking you, again, do you have a single case? And I think you've answered it, but I'm assuming, it sounds like you have no case.

MR. ANDREWS: Your Honor, I have the First Circuit case of *Jones vs. Pinetta*, where a court

reporter was found to be allowed to remove under the statute.

[14] THE COURT: Well, this is a court reporter reporting in federal court. That's a far cry from a private lawyer.

Certainly, if you sued my court reporter in federal court for something – I mean, in state court for something she did here, I would guess she would be a federal officer and able to remove; but, that's a far cry from you being a private lawyer in private practice.

I mean, I just think this is such a farfetched notion that it's ridiculous. And I was hoping that you could come up with one single case to tell me where you came up with this sort of crazy notion that a private lawyer can somehow be a federal officer, an officer of the United States courts, for purposes of the removal statute.

MR. ANDREWS: Your Honor, I have the line of cases that interpret subsection one of the federal officer removal statutes. Most of the cases have been based on the contractor defense, federal contractor defense.

THE COURT: That's the whole purpose of the federal officer removal statute. It's to make sure a federal officer engaged in executing his or her official duties is not subject to, for example, arrest in state court for just, you know, performing their official duties, in state court. And they can't – they're allowed to remove it here so they can assert a federal defense

such as – the common one is immunity, federal officer immunity; or, in the case of a contractor, federal [15] contractor defense.

I mean, this is something I've just – I don't know where you pulled this notion out of the air somewhere, you know. I'm waiting to hear what basis you have for making this allegation.

MR. ANDREWS: Your Honor, under subsection one, and in mostly federal contractor cases, people acting under federal officers –

THE COURT: Which federal officer were you acting under when you did whatever you're alleged to have done in the court? What federal officer was directing you to file the pleadings you filed, or file the RICO suit, or filed any other pleadings that you're – and I'm not making any – understand, I'm not making any prejudgment here on any validity, whether there is any validity at all to Mr. Howard's state court claims against you. But in the federal contractor defense context, the contractor has to show that the contractor was acting pursuant to the directions of a federal officer.

For example, the government comes up with plans as to how to build something, and they tell the – hire a contractor, and this is how we want it built and designed. And the contractor does it in accordance with the government's specifications and directions; then, they are generally entitled to assert the federal contractor defense.

There was no one directing you to do what you did [16] here. You were acting as a private attorney.

MR. ANDREWS: And as an officer of the court, Your Honor. I have no case that says –

THE COURT: So I was directing you to do what you did in this Court, to file what you filed? Are you saying I was the federal officer who was directing you in what you did?

MR. ANDREWS: You didn't direct me to file the case, Your Honor.

THE COURT: Well, name the federal officer who was directing you.

MR. ANDREWS: The entire court was.

THE COURT: The entire court. So the en banc court was directing you to file your pleadings and telling you what to plead and how to plead and what to allege; is that what you're saying?

MR. ANDREWS: No, Your Honor, I'm not saying that –

THE COURT: That's what you just said. You said the entire court was.

Let's move on to something – beyond the fact of not being a federal officer, what is the colorable federal defense that you are alleging in this case?

MR. ANDREWS: Well, the federal defense, which is part of the officer removal, is the claim preclusion, the *res judicata*, the fact that

THE COURT: If you've done any research at all, by now [17] you would have learned that the fact that a state court lawsuit may make claims that could be subject to a *res judicata* defense because of a prior federal court judgment, that is not the basis, that does not give you federal jurisdiction or basis to remove that case.

I've had a number of these cases where people come in, and they will remove a case here from state court because they said it's related to an earlier federal court suit, some judgment or order or ruling that I've rendered. And it may well be related, but that is not proper grounds for removal.

MR. ANDREWS: Yes, Your Honor.

THE COURT: I assume you would have found that out. And there are plenty of jurisprudence for that, the main case being the United States Supreme Court case of *Rivet*, R-I-V-E-T, *versus Regions Bank*, which came out of Louisiana, by the way –

MR. ANDREWS: Yes, Your Honor. I cite that –

THE COURT: – a 1998 case, in which a unanimous Supreme Court held that, "Claim preclusion by reason of a prior federal judgment does not provide a basis for removal jurisdiction."

MR. ANDREWS: Your Honor, that was under 1441.

THE COURT: Did you find that case?

MR. ANDREWS: Yes, sir, I cite it in my brief. And what *Rivet* held was that the claim preclusion was a federal defense; and, therefore, in the *Rivet* case did not create removability [18] under Section 1441.

But my reading of *Rivet*, and I quoted from *Rivet* in my reply brief – I'm sorry, my response brief, and they said that claim preclusion is a defense; and, therefore –

THE COURT: Sure, it's a defense. It can be a defense. It's a defense in state court. But you can raise that in state court, and the state court is fully competent of ruling on that.

Okay, let's move on to another question, because you're not doing too well, here, Mr. Andrews, so far.

What is the federal law that would give this Court federal question jurisdiction?

MR. ANDREWS: 28 U.S.C. Section 1367(d), Your Honor.

THE COURT: All that statute provides is that when I dismissed the federal RICO claim with prejudice, and then I dismissed your state law claims in the original underlying suit without prejudice, you had a right to go back and refile those in state court, if you did it timely.

MR. ANDREWS: Yes, Your Honor.

THE COURT: And whether you did or did not, the state court will have to sort that out; but, that doesn't give you federal jurisdiction here. Those were on – that's on the supplemental jurisdiction claims.

MR. ANDREWS: Your Honor, you did –

THE COURT: So that's your only argument here for federal question is 1367(d)?

[19] MR. ANDREWS: Mr. Howard sued me –

THE COURT: No. Answer my question.

MR. ANDREWS: No, Your Honor. I have a much weaker claim based –

THE COURT: You have a weaker one than that?

MR. ANDREWS: Yes, sir.

THE COURT: Well, let me hear what the weaker one is because –

MR. ANDREWS: The weaker one is based on the civil RICO suit. The stronger one is the 1367(d), which would normally be something to be worked out in state court. It would normally be the plaintiffs/counter-defendants' defense to the counter-claims; but, he amended his complaint, his main action. He amended it to include claims against me for filing the reconventional demand that I was supposed

to have known was time barred. He, therefore, made this federal question of 1367(d) a part of his main action.

THE COURT: Are you suggesting that any time a lawyer does something in federal court and is subsequently sued in state court for legal malpractice, say, or under any state law theory, that that's removable to federal court? Because that's where your argument would lead to. We'd have almost – well, we'd have a whole slew of state law cases removed here just because it involved a lawyer who did something in federal court.

MR. ANDREWS: No, Your Honor, that's not what I'm [20] saying.

THE COURT: That seems to be where your argument would go, you know, would lead to. That would be a logical conclusion.

MR. ANDREWS: The original action for defamation was not removable. I looked. It wasn't removable. It was only when these claims for my bringing the reconventional demand two weeks earlier, only when those claims were amended into the petition that it –

THE COURT: I don't see where anything really changed. It sounds like Mr. Howard just thought of a few other legal bases, but he was alleging the same basic facts. I mean, all of this comes from the original RICO lawsuit and what you did in state court in connection with that –

MR. ANDREWS: Your Honor, he –

THE COURT: – that you accused him of all of these things. And I don't know how that changes anything.

MR. ANDREWS: He could not have sued me for filing the reconventional demands until I filed the reconventional demands two weeks before he sued me on them.

THE COURT: But the reconventional demands just regurgitated what you had already alleged in this Court and in state court. I don't see how that changed anything.

MR. ANDREWS: Because he sued me for bringing them as time barred. That was an element of his suit, because they were time barred. It didn't matter what they said.

[21] THE COURT: If they are, they are; if they are not, they are not. But state court can figure that out as well as I can. I don't see any way that gives us federal jurisdiction here.

Anything else you want to add, Mr. Andrews?

MR. ANDREWS: No, Your Honor. Thank you.

THE COURT: All right. As I said, this case arises out of a suit originally brought by Attorney Douglas Howard in First City Court seeking unpaid legal fees against Ms. St. Germain. And, ultimately, at some point, a default was entered when

Ms. St. Germain did not timely answer that lawsuit in First City Court, and a judgment was entered on behalf of Mr. Howard.

Apparently, after being unable to get that judgment set aside, Mr. Andrews, on behalf of Ms. St. Germain and another client, came to this Court and filed a federal RICO, a racketeering lawsuit, against Mr. Howard alleging that he had engaged in a criminal racketeering enterprise in conjunction with his practice of domestic law.

This Court, ultimately, after hearing argument on the case, on the motions to dismiss – I don't remember now if it was a motion to dismiss or a motion for summary judgment, but I held that the plaintiffs in this Court, in the RICO case, failed to state a viable claim under RICO, and I dismissed all the federal claims in that case with prejudice, and I dismissed the supplemental state law claims without prejudice.

The plaintiffs in that RICO case appealed to the [22] Fifth Circuit. The Fifth Circuit affirmed the dismissal. It is true that both this Court and the Fifth Circuit denied the defendant, Mr. Howard, in that case, the defendant's motion for sanctions. I don't recall exactly what was said about that at the time, frankly, but I think I made a ruling from the bench, as I recall. But I'm not a big fan of sanctioning lawyers, and I'm assuming I just gave Mr. Andrews the benefit of the doubt by not sanctioning him; although, it was certainly plausible that he could have been

sanctioned, I think, for filing that RICO suit, which was totally baseless, as far as I am concerned.

The Fifth Circuit, as I recall, also, in denying the sanctions, made a comment that it was a very close call, which means that could have gone either way.

My understanding is the underlying judgment has been paid; is that right? The legal fees have been paid?

MS. REED: Yes, Your Honor.

THE COURT: It would have been nice if everybody would have just acted as grown-ups at that point and put this thing, this mess behind them; but, for whatever reason, neither side appears capable of doing that.

It's alleged – and I haven't looked at Mr. Andrews' web site, but it's alleged that Mr. Andrews and his clients are continuing on what might be termed a vendetta, a retaliation against Mr. Howard. Mr. Howard, in turn, has filed a state court lawsuit alleging defamation, abuse of process and [23] malicious prosecution. Again, I'm not going to attempt to judge the validity of any of those claims.

And as a result of the filing of that suit, we're here now because Mr. Andrews removed that state court lawsuit here, arguing that there is federal jurisdiction under the so-called federal officer removal statute and/or under the federal question statute, removal statute.

I think neither of those arguments are plausible for the reasons I've largely stated. It's clear to me that there are a number of cases – it is hard to find a case precisely on point like this one, and maybe because this is so farfetched that nobody else has thought of filing something like this; but, in my view, there is no way that a private lawyer, acting in his private capacity in private practice, who handles a case in federal court can be considered an officer of the Courts of the United States for purposes of the removal statute.

And there is plenty of case law that indicates that that is the proper analysis. And you can look at the *Cammer* case from the United States Supreme Court, *Cammer versus United States*, where the Supreme Court held that a lawyer was not an officer of the court within the statute empowering federal court to punish as contempt misbehavior of any of its officers in their official transactions.

The district court case out of Florida, *Florida versus Shimek*, S-H-I-M-E-K, 1973, which held that a lawyer is not [24] an officer for removal statute purposes. There, an officer attempted to remove – apparently, a lawyer, I mean, had done something in federal court which led to state disciplinary proceedings against him. And he argued that he was an officer of the federal court acting in that capacity; therefore, he could remove the state disciplinary action to federal court. The court said, no, that's not correct.

And one case that's pretty close to our case here, closest in terms of factual background, is *Berg versus Leason,* a Ninth Circuit case from 1994, where after successfully defending himself in federal court against allegations of violations of federal security and racketeering laws, the plaintiff, who had been the defendant in the federal court action, plaintiff sued in state court for malicious prosecution. And the defendant removed the case; and, the circuit court – the district court refused to remand it. The Court of Appeals held that malicious prosecution claim did not arise under federal law simply because one element of proof required that the underlying action was legally untenable. And it's awfully close to we have here.

And it's already been decided, in this Court and the Fifth Circuit, that the underlying RICO case was legally untenable. Whether or not that ultimately leads a state court to conclude that it would be considered malicious prosecution or abuse of process or defamation is another matter to be decided in state court.

[25] So Mr. Andrews is not a federal officer. Beyond that, he has not raised a colorable federal defense. And, lastly, there are no federal causes of action or claims pled in the state court lawsuit to make it removable under the federal question jurisdiction. And so, for those reasons, I'm going to grant the motion to remand this case. I'm remanding it for lack of federal subject matter jurisdiction.

Mr. Andrews, I'm going to – was there a request for sanctions in this case or for imposition of fees and costs?

MS. REED: Yes, Your Honor, there was.

THE COURT: I'm going to award Mr. Howard reasonable attorney's fees and costs in conjunction with needing to file the motion to remand and arguing it here today. I'm going to order that a motion for fees, properly supported and documented, be filed within 15 days; that any opposition or traverse to that motion be filed seven days thereafter, and I'll issue my ruling on that.

All right.

MS. REED: Thank you, Your Honor.

MR. HOWARD: Thank you, Your Honor.

THE COURT: Mr. Andrews, before you file any more, you know, you filed a RICO claim in this Court, which was baseless; now, you've filed a removal, which was totally baseless. I am imposing fees and costs this time. This has got to stop. And I strongly suggest that you do a lot more research before you start [26] filing things in federal court, again.

Thank you, Counsel.

MS. REED: Thank you, Your Honor.

(WHEREUPON, at 10:10 a.m., the proceedings were concluded.)

* * *

REPORTER'S CERTIFICATE

I, Cathy Pepper, Certified Realtime Reporter, Registered Merit Reporter, Registered Professional Reporter, Certified Court Reporter, Official Court Reporter for the United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

s/ Cathy Pepper
Cathy Pepper, CRR, RMR, CCR
Official Court Reporter
United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

D. DOUGLAS HOWARD, JR.	CIVIL ACTION
VERSUS	NO: 09-3450
ST. GERMAIN ET AL	SECTION: J(4)

ORDER

(Filed Jul. 20, 2009)

Before the Court is Plaintiff's **Motion for Attorney's Fees (Rec. Doc. 59)**, filed in accordance with the Court's ruling in open-court on June 24, 2009, which granted Plaintiff's motion to remand the above-captioned matter and awarded attorney's fees and costs under 28 U.S.C. § 1447(c) in connection with Defendants' wrongful removal of this case. Plaintiff avers that no costs were incurred in the filing of the motion to remand, and thus he seeks only a reasonable attorney's fee in the present motion. The Defendants' opposition attempts in large part to argue against the validity of the Court's determination that a fee award is warranted in the present circumstances. As the Court has already made its determination as to the propriety of an award under § 1447(c), the Court will not address Defendants' arguments that such an award is improper.

To the extent Defendants oppose the quantum of Plaintiff's requested award, the Court finds that Defendants' arguments are unavailing. Under the provisions of § 1447(c), "[a]]n order remanding [a]

case may require payment of just costs and any actual expenses, including attorney's fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). "[T]he imposition of both costs and attorneys' fees against the removing party may be awarded in the Court's discretion" upon a finding that removal is improper under § 1447(c). *Miranti v. Lee,* 3 F.3d 925, 928 (5th Cir. 1993).

The Fifth Circuit adheres to the "lodestar" method for calculating reasonable attorneys' fees in the context of an award under § 1447(c). *Halliburton Latin America SA v. Intern. Technical Solutions,* 273 F.3d 392, 392 (5th Cir. 2001). This method requires the district court to "determine the reasonable number of hours expended on the litigation and the reasonable hourly rate for the participating lawyers" based on "contemporaneous billing records or other sufficient documentation so that the district court can fulfill its duty to examine the application for noncompensable hours." *La. Power & Light Co. v. Kellstrom,* 50 F.3d 319, 324 (5th Cir. 1995). "A lodestar is calculated by multiplying the number of hours reasonably expended by an appropriate hourly rate in the community for such work." *Heidtman v. County of El Paso,* 171 F.3d 1038, 1043 (5th Cir. 1999). The lodestar is presumed to be the reasonable fee, but it may be adjusted after considerations of the factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), overruled on other grounds, *Blanchard v. Bergeron,* 489 U.S. 87

(1989). *Gonzalez v. Associates Health & Welfare Plan*, 2002 WL 31933208, 1 (5th Cir. 2002).

In this case, Plaintiff has requested a fee award in the amount of $7,088.00, which the Court finds to be appropriate in light of the hours reasonably expended and the hourly rate charged in procuring a remand of this matter. The Court notes that the $7,088.00 fee award is especially appropriate in light of the two-year history of vexatious litigation against Plaintiff by the Defendants in this matter, which has already nearly resulted in sanctions against Defendants on two prior occasions. See Civil Action No. 07-9040, Rec. Docs. 33 and 39. Additionally, the Court notes that Defendants' various grounds for removal – while ultimately baseless – were wide-ranging and complicated, and thus required significant effort by counsel for Plaintiff.

Finally, to the extent that Defendant Andrews argues that an award of $7,088.00 against him *individually* would be financially ruinous, the Court notes that it is within the Court's discretion to impose any fee award against all the Defendants, jointly and severally, as parties to the improper removal. See, e.g., *Park Nat. Bank of Houston v. Kaminetzky*, 976 F. Supp. 571, 584 (S.D. Tex. 1996). Thus, Andrews' arguments related to his individual financial situation are irrelevant.

As such, the Court finds that Plaintiff's requested fee award of $7,088.00 is reasonable in the circumstances of this case. Accordingly,

IT IS ORDERED that Plaintiff's **Motion for Attorney's Fees (Rec. Doc. 59)** is hereby **GRANTED**. Plaintiff is hereby awarded $7,088.00 under 28 U.S.C. § 1447(c) as a reasonable attorney's fee for the remand of this matter, to be paid by Defendants Lesley Simmons St. Germain, Hillary Rose Hillyer, Melissa Branighan Luminais, Mark Edward Andrews, Andrews Arts & Sciences Law, LLC, and David E. Simmons, jointly and severally.

New Orleans, Louisiana this 20th day of June, 2009.

/s/ Carl J. Barbier
CARL J. BARBIER
UNITED STATES DISTRICT JUDGE

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No. 10-58

SUPREME COURT, U.S.
FILED

In the
Supreme Court of the United States

MARK EDW. ANDREWS,
Petitioner,

v.

D. DOUGLAS HOWARD, JR.,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

(No change from Petition as filed)

After being sued for malicious prosecution in state court for prior litigation in federal court, defendant attorney removed to the same federal court, on both federal-question and officer-of-the-court grounds. The district court remanded and ordered fee shifting. Defendant appealed the fee shifting and quantum of award, which were affirmed by the circuit court, with the addition of Rule-38 sanctions for frivolous appeal.

1. Is officer-of-the-court removal under 28 USC §1442 categorically unavailable to admitted attorneys?

2. Is fee shifting on remand under 28 USC §1447(c) properly imposed in the absence of clearly-established law demonstrating a lack of reasonable basis for removal?

3. Is an appeal on an unresolved or novel question frivolous and sanctionable under F.R.A.P. Rule 38?

4. May lodestar analysis of fee shifting be bypassed if a court regards litigation to be vexatious?

RULE 14.1(B) STATEMENT

(No change from Petition as filed)

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellee and Respondent:

Desmond Douglas Howard, Jr., Attorney at Law, is a natural person of majority, admitted to practice in Louisiana, Bar. No. 7021, maintaining a professional office in New Orleans, Louisiana.

Defendant-Appellant and Petitioner:

Mark Edw. Andrews, Attorney at Law and Registered U.S. Patent Attorney, is a natural person of majority, admitted as an attorney in Louisiana (No. 26172) and California (No. 232519), maintaining a professional office in New Orleans, Louisiana.

Other Defendants-Appellants below:

Andrews Arts & Sciences Law, LLC, organized in Louisiana, is the solo-practice law firm of Mark Edw. Andrews.

Lesley Simmons St. Germain is a natural person of majority and resident of New Orleans, Louisiana.

Hillary Rose Smith is a natural person of majority and resident of New Orleans, Louisiana.

Melissa Branighan is a natural person of majority and resident of Jefferson Parish, Louisiana.

David E. Simmons, DDS, is a natural person of majority and resident of New Orleans, Louisiana, and is the father of Lesley Simmons St. Germain.

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PETITIONER'S REPLY BRIEF

OPINION BELOW
(Updated Information)

The published Fifth-Circuit opinion, *Howard v. St. Germain, et al.*, 09-30642 (CA5 3/5/2010), was reported at 599 F.3d 455.

SELECTED RELEVANT STATUTE
(From Appendix F of Petition)

28 USC §1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

[...]

ADDITIONAL STATEMENT

The lawsuit for defamation and malicious prosecution for the prior filing of a civil-RICO lawsuit in federal court—filed in state court against an attorney and his clients—was removed on §1442 and other, §1441 grounds. The officer-of-the-court removal was not based on some technicality that the attorney was admitted in federal court, but was based on the attorney being sued explicitly for acting as the attorney in specific prior federal litigation in the same federal court—a specific case, having Case Nos. 07-9040 in the Eastern District of Louisiana, 08-30364 in the federal Fifth Circuit, and 08-1296 in the Supreme Court of the U.S. The plaintiff's amended state-court complaint even explicitly quoted the words the sued attorney spoke at oral argument before the federal Fifth Circuit in the *prior federal litigation*.[1]

Although neither timing nor timeliness was addressed in the various orders and opinions below, timing was an important factor in the litigation. Louisiana's version of the anti-SLAPP statute, La. Code of Civil Procedure Article 971, says that a Special Motion to Strike is to be heard within 30 days of service—because the law is meant to effect speedy dismissal of bogus lawsuits. The state trial court's allowing the plaintiff to delay beyond the law's 30-day provision steered this lawsuit toward removal in two ways: it allowed time for the plaintiff to amend his suit to add removable claims, and it encouraged the defendants to consider a more favorable federal forum.

After remand, the state forum proved to be as unfavorable as feared—although the retaliatory lawsuit was ultimately dismissed in a supervisory writ by the state appeals court—7 months after remand.

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1. Amended state-court complaint, p.10, Record at USCA5-57.

REPLY

A. Attorneys' practice, discipline, and status as officers of the federal courts is in this Supreme Court's bailiwick.

No matter what Respondent says, the questions of attorneys removing cases and being assessed fee shifting and sanctions in their practice before the federal courts are of concern to this Supreme Court. With its responsibility over all courts and attorneys, this Court can properly clarify the definition of "officer of the court" and calibrate the risks of punishment faced by removing and appealing attorneys.

B. These questions are extraordinarily important in daily practice before state and federal courts.

Attorneys must quickly—within 30 days—evaluate whether removal is available and beneficial to the clients, and whether removal might bring punishing fee shifting or sanctions. This is extraordinarily important, and could benefit from as much clarity and guidance as this Supreme Court can give. When, as here, a published appeals-court opinion adds Rule-38 sanctions for appealing the §1447(c) fee shifting and quantum, the substantial threat of punishment creates a deterrent to removal in all but the most obviously safe cases.

In the Fifth Circuit—now—even if an attorney performs diligent research and finds no caselaw, the absence of caselaw is no defense against fee shifting and sanctions. And if a court regards *prior* litigation to have been "vexatious", then a lodestar analysis may be skipped and the quantum of fees may be summarily set—increasing the *in-terrorem* consequences of filing a notice of removal asserting any untested grounds.

The Fifth Circuit's disregard of absence of caselaw as an indicator against fee shifting, and the broad, categorical exclusion of admitted attorneys ever removing as officers of the court under §1442, makes removal on any untested grounds a scary proposition, and forecloses even the possibility of any future §1442(a)-removal by an attorney even under hypothetically-perfect facts.

In 1983, the Fifth Circuit's Judge Rubin observed the propriety—even the necessity and duty—of seeking a favorable federal forum.[2] Many attorneys will face this question for many years to come. Those attorneys will have 30 days—fewer in practice—to find out if existing law forecloses removal. Under the Fifth Circuit's published opinion here, those attorneys and their clients will be under a threat of punishing fee-shifting even where several days of research yields no caselaw whatsoever to inform their specific removal questions.

Lodestar analysis of attorney fees occurs daily in federal courts. Whether lodestar analysis may properly be bypassed and influenced by consideration of *prior* litigation is an extraordinarily important question.

C. This case invites review of the law unencumbered by issues of fact.

This case is the opposite of fact-bound. Here, both the district and circuit courts overlooked the facts of the case and declined to follow the proper rules and standards—electing instead to follow an older discretionary standard, and identifying the "vexatious" nature of the prior federal litigation as justification for both the §1447(c) and Rule-38 fee awards.

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2. *McCuin v. Texas Power*, 82-2230, 83-2115, (CA5 9/19/1983) 714 F.2d 1255, 1261-62.

Petitioner regards the one truly significant fact to be this: there was an in-circuit case[3] indicating in *dicta* that officer-of-the-court removal by an attorney was an unreached, unresolved question. Respondent has provided many details about this significant fact. Respondent's Appendix contains a transcript of the district court hearing where, on pages 12a–21a, a sense of the tone of the proceedings may be gleaned. Respondent contends in his conclusion (p.15) and throughout that "petitioner was unable to cite any legal support for removal", which is wrong, and which mischaracterizes the circumstance that there was no caselaw on attorneys removing as officers of the court.

D. This case presents an appropriate vehicle for resolution of the questions presented.

This case presents the issues cleanly. No extraneous issues are lurking about. Respondent (p.5) makes an attempt to confuse the case, including trying to raise a question of whether those defendants below who did not petition this Supreme Court will be stuck with the sanctions—an impossibility since the full $12,955 has already been paid by the Petitioner, and if this Petition results in vacated sanctions, they are vacated for all.

Respondent (p.7–11) extensively covers the other, §1441 federal-question grounds for removal that were asserted, although Respondent misstates the critical issue. In truth, Howard amended his main claims to include malicious prosecution for the defendants refiling legal-malpractice claims in state court against Howard, where those legal-malpractice claims had been dismissed without prejudice from federal court and were therefore tolled and protected by federal law

3. *Herron v. Continental Airlines, Inc.*, 95-10645, note 2 (CA5 1/23/1996) 73 F.3d 57, 59.

28 USC §1367(d). Although the Respondent's Brief confirms Petitioner's contention that arguably-reasonable alternative grounds for removal were stated, the Respondent's re-hashing the merits of the remand itself is not germane to the questions presented here.

E. These questions will only rarely be presented in a favorable posture for review.

It is to be hoped that this type of defamation and malicious-prosecution lawsuit in retaliation for prior litigation will not often be filed or will be quickly stricken under anti-SLAPP laws, and therefore will not need to be removed. If some intrepid attorney does remove such a lawsuit—in the teeth of the Fifth Circuit's opinion here—then it will be a matter of chance whether any remand or refusal to remand will be reviewed. Also, future litigants twice-popped for sanctions—as here—are unlikely to have the stomach for further appeal. Therefore, another, better opportunity to examine these issues is unlikely to come soon.

F. The Petition identified several extraordinarily-important things wrong with the decision below, warranting certiorari, and Respondent has not effectively countered anything.

Respondent's contentions (p.5–7) notwithstanding, the Petition here shows that there was no controlling caselaw whether an admitted attorney can remove as an officer of the court, and therefore the removing attorney here should not have been punished with fee shifting and sanctions. The *Cammer*[4] decision's analysis of the "ordinary meaning" of "officer of the court" may well be highly informative and a good place to

4. *Cammer v. United States*, 350 US 399 (1956).

start analyzing removal, but the *Cammer* decision said nothing at all about removal and cannot *control* here. The *Willingham*[5] decision was just flat-out mis-cited.

Also, the circuit court decided an issue not before it by ruling that attorneys categorically cannot remove as officers of the court; the lodestar analysis of the fees should not have been bypassed—no matter how vexatious the prior federal litigation was; and no Rule-38 sanctions should have been ordered because an appeal of a novel or unresolved question or a question of first impression is not considered frivolous or sanctionable[6].

Respondent's Brief completely omits and ignores the controlling *Martin v. Franklin Capital*[7] case, and fails to cite even a single case about §1447(c) fee shifting or Rule-38 sanctions.

G. The circuit court reached past the actual issues on appeal, and made the issue of officer-of-the-court removal part of the actual case here.

Respondent Howard contends (p.13–15) that the Petition is just a disguised appeal of the remand of Howard's defamation and malicious-prosecution case back to state court, but that is absurd because the state appeals court has finally-dismissed Howard's lawsuit under the anti-SLAPP law and ordered sanctions against Howard. The only issues still before the state courts are the quantum of sanctions against Howard and the legal-malpractice counterclaims against him.

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5 *Willingham v. Morgan*, 395 U.S. 402 (1969)

6 *Macklin v. City of New Orleans*, 01-31039 (CA5 7/25/2002) 300 F.3d 552, 554; *Estiverne v. Saks Fifth Avenue* 93-3317 (CA5 12/28/2002) 8 F.3d 1171, 1174

7 *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005)

The reason the actual remand in *this* case was not before the circuit court was because it was expressly *not* appealed. Whether or not it could have been appealed does not matter since it was not appealed. It is not clear whether §1447(d) blocks review of remand of a removal under §1442(a)(3) because there is no caselaw. That is a major point in this Petition—there is no caselaw, so there should be no fee shifting and sanctions. Overlooking that the remand itself was expressly not appealed, the circuit court published an opinion stating flatly that attorneys cannot remove as officers of the court under 28 USC §1442(a), and so the Fifth Circuit made that question an issue in this case.

The circuit court held that attorneys cannot remove as officers of the court, but that holding was based on two old cases, *Cammer*[8] and *Willingham*[9], both decided long before the 1996 amendments to 28 USC §1442. One of the many critical questions *not* addressed by the Fifth Circuit is this: if private persons or contractors operating under the authority and control of federal officers can remove under §1442(a)(1),[10] why are private attorneys operating under the authority and control of federal courts not allowed to remove under §1442(a)(3)?

H. This case squarely presents the rule missing in *Martin*—a rule regarding reasonableness.

In *Martin v. Franklin Capital*,[11] the parties there agreed removal was reasonable, and therefore the Court was constrained from providing a practical rule or standard of reasonableness. This absence was noted

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8. *Cammer v. United States*, 350 U.S. 399 (1956).

9. *Willingham v. Morgan*, 395 U.S. 402 (1969).

10. *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007).

11. *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005).

and solved by the Seventh Circuit in *Lott v. Pfizer*:

> As a general rule, if, at the time the defendant filed his notice in federal court, clearly established law demonstrated that he had no basis for removal, then a district court should award a plaintiff his attorneys' fees. By contrast, if clearly established law did not foreclose a defendant's basis for removal, then a district court should not award attorneys' fees.[12]

In formulating the rule, the Seventh Circuit relied explicitly[13] on the Fifth-Circuit *Valdes*[14] case which had been cited with approval in *Martin*. The Seventh Circuit's *Valdes*-based reasoning was, in turn, explicitly followed by the Ninth Circuit.[15] Wherever the issue has arisen, the other circuits are following the Fifth Circuit's *Valdes*—except for the Fifth Circuit itself, which has overlooked *Valdes* and reverted to an older[16] "discretion" standard instead of Chief Justice Marshall's discretion standard as restated[17] in *Martin*.

Development of the rule missing in *Martin* was progressing smoothly through the Seventh and Ninth Circuits, but it went off the rails in the Fifth Circuit in this case. The useful and clear rule was briefed to both the district and the appeals courts, who rejected it without comment. The Fifth Circuit overlooked the rule and affirmed §1447(c) fee shifting on the basis of

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12. *Lott v. Pfizer, Inc.*, 06-3372 (CA7 6/25/2007) 492 F.3d 789, 793.

13. *Lott v. Pfizer, Inc.*, 06-3372 (CA7 6/25/2007) 492 F.3d 789, 792.

14. *Valdes v. Wal-Mart Stores, Inc.*, 99-20519 (CA5 1/12/2000) 199 F.3d 290, 293.

15. *Lussier v. Dollar Tree Stores, Inc.*, 06-35148 (CA9 3/7/2008) 518 F.3d 1062, 1066.

16. *Miranti v. Lee*, 92-3576 (CA5 10/7/1993) 3 F.3d 925.

17. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005).

the district court's *discretion upon remand*, and then added Rule-38 sanctions for a frivolous appeal on top of that. Whether the rejection of that rule here is a conflict among circuits or a conflict with existing in-circuit precedent is an arguable point, but in any case it warrants certiorari, and this opportunity to examine the rule missing in *Martin* is important enough to be taken up by this Supreme Court.

I. Prior federal-court litigation—vexatious or not—plays no proper part in determining §1447(c) fee shifting or Rule-38 sanctions.

Respondent's Brief highlights how the courts below justified §1447(c) fee-shifting and Rule-38 sanctions by discussing the vexatious nature of the *prior federal litigation*—which the circuit court even refers to as "*Howard I*"[18], and which is the same prior federal litigation that the Defendants reasonably thought gave them grounds to remove the later retaliatory lawsuit. Courts are supposed to avoid summary approval of fees in all cases.[19] Respondent (p.12) misstates the record where he contends that the Fifth Circuit did apply a lodestar analysis. The record shows otherwise. Respondent provides (p.9) a page from the 24 June 2010 hearing transcript where the district court revealed that the fee shifting was, in effect, sanctions for the *prior federal litigation*; and also provides (p.10) the Fifth Circuit's language in its 5 March 2010 decision revealing that the Rule-38 sanctions were based as much on the prior "*Howard I*" case as on the case then at bar.

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18. App. A to the Petition at p.4a, *Howard v. St. Germain, et al.*, 09-30642 (CA5 3/5/2010) 599 F.3d 455, *citing (as "Howard I") St. Germain, et al. v. Howard, et al.*, 08-30364 (CA5 1/20/2009) 556 F.3d 261.

19. *In re High Sulfur Content Gasoline Products Liab.*, 07-30384 (CA5 2/4/2008) 517 F.3d 220, 227.

J. Fifth-Circuit misapprehension of *Willingham* is prejudicial and is Respondent's fault.

Respondent contends (p.4) that the circuit court's misapprehended misstatement of the Supreme Court's 1969 *Willingham v. Morgan*[20] opinion is correct—that *Willingham* actually speaks to attorneys removing as officers of the court. But that is completely wrong, and this new law announced by the Fifth-Circuit opinion here is based on a serious flaw. The circuit court states that *Willingham* held that the federal-officer removal statute was "not intended for a private attorney to use to remove a state action to federal court on the basis that he was an 'officer of the court'",[21] when, in fact, the *Willingham* case had nothing at all to do with removal by attorneys or any officers of the courts, but instead was a removal by a federal prison warden and a medical officer being sued by a federal prisoner. This glaring error in the Fifth-Circuit opinion appears to have come directly from page 11 of the Respondent-Appellee's 14 October 2009 Brief to the Fifth Circuit, where the Appellee garbled the holding in a 1973 district-court case, and presented it as the 1969 Supreme Court holding in *Willingham*.

RESPONDENT'S MISSTATEMENT OF THE CASE

Respondent begins (p.1) by misstating that "[t]his case first began in First City Court for the City of New Orleans", but Respondent is misrepresenting *prior* litigation as "this case". Respondent makes several other misstatements and mischaracterizations, but refutation is not essential for the questions presented here.

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20. *Willingham v. Morgan*, 395 U.S. 402 (1969).

21. App. A to the Petition, Circuit Court Opinion, p.3a.

CONCLUSION

Because the Fifth Circuit made a broad ruling that officer-of-the-court removal is not available to admitted attorneys, on an issue not appealed to that court; because the district and circuit courts did not apply the proper standard in awarding fee shifting on remand, and declined to follow a rule regarding reasonableness followed by the 7th and 9th Circuits; because the circuit court ordered sanctions for frivolous appeal of an unresolved or novel question; and because the district and circuit courts did not apply a proper lodestar analysis to the quantum of award, but instead looked to the vexatiousness of prior federal litigation, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted:

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